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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1006

BARCLAY HOME PRODUCTS, INC., AND ALEXANDER BUCHMAN AND LOUIS BUCHMAN, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Barclay Home Products, Inc., et al., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, dated February 14, 1957.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 241 F.(2d) 451, U.S. App. D. C. . The opinion is submitted herewith as an appendix to this petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the District of Columbia Circuit and its judgment in favor of Respondent was made and entered on February 14, 1957. No petition for rehearing was filed.

This Court has jurisdiction of the questions presented under the provisions of Title 28, U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Should the law governing identical factual situations arising under the Federal Trade Commission Act, be left in such posture that the decisions of the United States Courts of Appeals for the Second and Third Circuits and for the District of Columbia Circuit are directly in conflict with the decision of the Seventh Circuit?

2. Should the conflicting decisions of the abovementioned United States Courts of Appeals be allowed to remain without review by this Court where the effect of such decisions is to allow one company in an industry to continue its present practices where substantially all other companies in the industry have been forbidden to continue such practices?

3. Did the United States Court of Appeals for the District of Columbia Circuit err in refusing to con-

sider questions properly raised before that Court for the reason that they could not be urged before the respondent, Federal Trade Commission?

STATUTES INVOLVED

The statutes directly involved are Title 15 U.S.C. Sect. 45(a)(1)(6):

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

and Title 5 U.S.C. Sec. 1006(c):

> Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. * * * No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

STATEMENT

Petitioners, a corporation and its principal officers, were cited by respondent for violations of respondent's Trade Practice Rules applicable to the Feather and Down Products Industry. The matter was one of eleven proceedings brought by respondent against members of this industry, and as such covered practically all pillow production in the industry. All such proceedings involved the assertion that the labels used on pillows describing the kinds or types and proportions of filling materials contained in pillows did not meet the prescribed standards of accuracy under the Trade Practice Rules for the Feather and Down

Products Industry. 16 CFR Sec. 200 (Supp. 1955). All such cases were heard contemporaneously by the same hearing examiner, except this case which was heard later by the same hearing examiner.

Respondent used the testimony of the same expert witness in all such cases. All eleven cases heard by the Examiner were appealed to the Commission. In three cases in which the Examiner dismissed the complaint, the Commission reversed the decision of the Examiner and issued cease and desist orders. In the other eight cases, the Commission sustained the Examiner's issuance of similar orders. Thus, the Commission sustained the charges against each manufacturer, irrespective of the Initial Decision of the Examiner.

In the instant case the Commission's evidence, as in all the other related cases, consisted principally of the testimony of J. Davis Donovan. Evidence introduced by the Petitioners herein, consisted principally of the testimony of two expert witnesses, Charles Pomerantz, and Ernest Anderson of United States Testing Company, who appeared as expert witnesses for members of the industry in other related cases. All three of these experts analyzed samples taken from Petitioners' pillows selected by the Commission as a basis for its Complaint. On the basis of these analyses, Petitioners' two expert witnesses testified that the contents of the Petitioners' pillows were not other than as represented by the labels, taking into consideration the 15% tolerance established by the Federal Trade Commission's Trade Practice Rules for the Feather and Down Products Industry. The Commission's expert witness, Donovan, testified that the contents of Petitioners' pillows were not within

the established tolerance. The Petitioners, prior to the taking of testimony had stipulated the qualifications and methods or manner of analyses used by the Commission's expert. Testimony of Petitioners' experts was admitted into evidence by the Hearing Examiner and neither the counsel for the Commission nor the Examiner ever questioned the qualifications of Petitioners' expert witnesses or the propriety or accuracy of their methods or manner of analysis.

Following the Hearing, the Examiner issued his Initial Decision in which he held that Petitioners' experts did not follow "procedures prescribed in the Trade Practice Rules", that the Commission's expert had followed the prescribed procedure, and therefore, decided that "their (Petitioners' expert witnesses) test results cannot be accepted as accurate, and the test results of the expert who testified in support of the Complaint, *therefore,* must be accepted as representative of the contents of the pillows tested." (Tr. 24; Emphasis supplied). With this cavalier finding and without further particularization, the Hearing Examiner summarily rejected the testimony of Petitioners' witnesses and thus failed to accord their testimony any weight in his determination.

Petitioners then sought review of the Examiner's decision by the Commission. Petitioners, unable to fathom the Examiner's reasoning for rejecting their expert testimony, from the language of the Initial Decision, took the position that the testimony of their experts should have been accepted as accurate and should have been considered by the Hearing Examiner in determining the specific quantities in the pillows in question. (Tr. 51).

After the submission of briefs and oral argument, the Commission issued its Decision affirming the Initial Decision. In the twenty-six lined Decision, notable for its lack of particularity, definitiveness and clarity, the Commission affirmed the Hearing Examiner and stated:

> "* * * the similarity between the Burton-Dixie Corporation and Summergrade cases and the instant matter, renders the opinions in those cases equally applicable here, and for the reasons there stated, the Commission is of the view that the Hearing Examiner correctly concluded that the Respondents have misrepresented the contents of certain of their pillows * * *" (Tr. 28)

For the first time in this proceeding, Petitioners became aware that the Commission had predicated its decision upon the basis and for the reasons stated in a separate proceeding—the *Burton-Dixie* case. It then became the lot of Petitioners to examine the *Burton-Dixie* case with a view toward determining its applicability or relevancy to the instant proceeding. Following an analysis of this case, and reading it in consort with the Decision herein, Petitioners sought review before the United States Court of Appeals for the District of Columbia Circuit on three grounds. These grounds are:

> "(1) That testimony of petitioners' experts had been totally disregarded because it was not styled in a manner made mandatory subsequent to its introduction;
>
> (2) That testimony of petitioners' experts had never been weighed; and
>
> (3) That rejection of testimony of petitioners' experts constituted an amendment to the

> Trade Practice Rules without notice to Petitioners." (Tr. 69)

Following the submission of briefs and oral argument the United States Court of Appeals for the District of Columbia Circuit denied the petition and affirmed the order of the Commission in a brief decision, the essence of which is quoted as follows:

> "These grounds were not urged before the Commission. We are therefore, not bound to consider them now.
>
> We note our agreement, however, with the Courts of Appeals for the Third and Second Circuits in sustaining the Commission's like evaluation of these tests in related cases involving other members of this industry." (Tr. 68, 69).

REASONS RELIED UPON FOR GRANTING THE WRIT

I

THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THIRD CIRCUITS AND THE DISTRICT OF COLUMBIA CIRCUIT, IN THE INSTANT CASE, ARE IN DIRECT CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ON THE SAME MATTER OF FEDERAL LAW, AND ON THE SAME GENERAL FACTUAL SITUATION.

We are principally concerned with the related cases which have been appealed to and decided by the United States Courts of Appeals. These include *Northern Feather Works* v. *F.T.C.* and *Sumergrade* v. *F.T.C.*, 234 F. (2d) 335 (3d Cir. 1956); *Buchwalter* v. *F.T.C.*, *The L. Buchman Co.* v. *F.T.C.* and *Sanitary Feather and Down Co.* v. *F.T.C.*, 235 F.(2d) 344 (2d Cir. 1956); *Burton-Dixie Corporation* v. *F.T.C.*, 240 F.(2d) 166 (7th Cir., Jan. 10, 1957); *Lazar* v. *F.T.C.*, 240 F.(2d) 176 (7th Cir., Jan. 10, 1957); and the instant case,

Barclay Home Products, Inc., et al. v. *F.T.C.*, 241 F.(2d) 451 (D.C. Cir., 1957).

It should be noted that the United States Court of Appeals for the District of Columbia Circuit in deciding the instant case, indicated its agreement with the Courts of Appeals for the Third and Second Circuits in sustaining the Commission's evaluation of the expert testimony. (Tr. 69).

The case in which the factual situation most closely parallels the instant proceeding and the decision most directly in conflict with the instant matter, is *Burton-Dixie Corporation* v. *F.T.C.*, referred to above. In the *Burton-Dixie* case the expert who testified on behalf of the Commission was the same expert who testified against the Petitioners herein, and one of the experts for the Petitioners herein was also the principal expert for the Respondent therein. In both *Burton-Dixie* and the instant case the Commission cited as evidentiary support for their decision the expert testimony of witness Donovan who appeared in both cases for the Commission. In appraising Donovan's testimony, the Seventh Circuit stated

> "* * * on the other hand, Donovan, employed by the Commission, made an analysis upon which the Commission relied, which Donovan's own testimony demonstrates, was of no probative value. * * * We are of the view and so hold that the analyses made by him (Donovan), of the crushed feather pillows, does not furnish substantial support for the Commission's decision." *Burton-Dixie Corp.* v. *F.T.C.*, 240 F.(2d) 166, 174, 175.

In the *Burton-Dixie* case, as in the instant matter, the Commission summarily rejected the testimony of Anderson and accepted the testimony of Donovan as

controlling. Commenting on this action, the Seventh Circuit stated

> "* * * we are firmly convinced of the soundness of the Examiner's conclusion that their (Donovan and Anderson) testimony was entitled to equal weight. They both qualified as experts and testified as such. The cross-examination of Anderson by counsel for complainant which was only perfunctory in nature, indicates that his qualifications were recognized." *Id.*, p. 171.

Consequently, in the instant matter as in the *Burton-Dixie* case, we have a parallel situation in which the Commission based its decision solely upon one witness (Donovan) and afforded no weight to an expert (Anderson) for both Respondents. Furthermore, if there be any doubt as to the similarity of these two cases, the Commission resolved this question in its Final Decision in the instant matter wherein they cite the *Burton-Dixie* case as controlling. (Tr. 28).

For all of the foregoing reasons, there can be no doubt that the decision of the United States Court of Appeals for the Seventh Circuit in the *Burton-Dixie* case, is in direct and patent conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in the instant matter. It should be noted that this Court was not asked to grant a writ of certiorari to review the *Burton-Dixie* case.

II

THE EFFECT OF ALLOWING THE CONFLICT OF DECISIONS OF THE UNITED STATES COURTS OF APPEALS TO STAND WITHOUT REVIEW BY THIS COURT, IS TO ALLOW ONE MEMBER OF AN INDUSTRY TO CONTINUE PRACTICES AND METHODS OF MANUFACTURE DENIED SUBSTANTIALLY ALL OF THE COMPETING MEMBERS OF THE SAME INDUSTRY.

As is the case in many industries, the Federal Trade Commission insists upon uniformity of methods and manner of manufacturing, so as to insure fair competition among the various members of the same industry. To assure uniformity of method, the Federal Trade Commission periodically holds Trade Practice conferences at which the Commission and the members of an industry mutually agree upon reasonable and uniform practices, procedures and methods of manufacturing. The members of the Feather Down Products Industry involved herein, have held such conferences and operate under established Trade Practice Rules. In the course of the proceedings in most of these cases, it was determined, and in fact stipulated, that all of the members of this industry followed standard and as near identical as possible, mixing, processing and other manufacturing practices. (Tr. 29).

The effect of the Commission's decisions and their affirmation by the United States Courts of Appeals in certain of the cases (that the industry's products were not in conformity with the Commission's requirements) is to condemn the uniform manufacturing practices as not producing products which meet Commission standards. In other words, the Commission's decisions have forced ten out of eleven competitive members of the same industry to revamp their methods of manufacture while one member, the Burton-Dixie

Corporation, is free to continue the alleged discredited and unsatisfactory methods. This situation for this industry is not unlike that in the automobile replacement parts industry which apparently led this Court to grant a writ. *Moog Industries, Inc.* v. *F.T.C.*, No. 750, October Term, 1956.

If, as the Commission's decisions imply, more exact and higher standards of manufacturing are needed in the industry, then the conflicting decisions of the United States Courts of Appeals have left one member of an industry in a more advantageous competitive posture in relation to substantially all the other members of the industry.

Such a situation requires resolution which cannot be accomplished other than through review by this Court of the conflicting decisions.

III

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WAS IN ERROR IN AFFIRMING THE DECISION OF THE COMMISSION ON THE BASIS THAT THE GROUNDS URGED BY THE PETITIONERS WERE NOT URGED BEFORE THE COMMISSION.

Before discussing the reasons for the grounds urged by Petitioners before the Court of Appeals, it would be helpful to this Court to examine the grounds urged before the Commission and the reasons therefore. In appealing to the Commission, Petitioners were necessarily restricted in their exceptions to the Examiner's decision by virtue of the vagueness and generality of that decision. (Tr. 24). Even a quick perusal of the Initial Decision reveals that the Hearing Examiner failed to particularize and explain his findings of fact or the reasons therefore, sufficient to apprise Petitioners of the basis for his decision.

Consequently, Petitioners were at a loss to assign the particular reasons why the Commission should reverse the Initial Decision. Petitioners thus had no choice but to argue that the Hearing Examiner should have accepted Petitioners' expert testimony and should have considered same in arriving at his decision.

It was not until the Commission's final decision (Tr. 27, 28) that the Petitioners became aware of the fact that the Commission, and apparently the Hearing Examiner, had relied solely upon the *Burton-Dixie* case in evaluating the testimony of Petitioners' witnesses. It should have been obvious to the United States Court of Appeals for the District of Columbia Circuit, that Petitioners were laboring under the disability of a vague and generalizing opinion of the Hearing Examiner and for that reason were unable to unravel the mental processes of the Hearing Examiner in reaching his decision until after the Commission made it clear that the *Burton-Dixie* decision controlled in the instant matter. In plain words, Petitioners could not possibly have specified, in their appeal to the Commission, with the same particularity used before the Court of Appeals since they were without knowledge that the Commission had prejudged their case by a prior decision.

Upon reading the *Burton-Dixie* case, Petitioners discovered that the Commission had interpreted the method of analysis to be used in testing so as to preclude giving weight to Petitioners' expert witnesses. As previously stated, the Hearing Examiner admitted Petitioners' testimony without objection and failed to explain in his decision the reason for its subsequent rejection. The reason, which must have controlled the Hearing Examiner and the Commission, is

apparent from a reading of the *Burton-Dixie* case (Tr. 40) in which the Commission stated:

> "* * * We resolve that conflict (in the Trade Practice Rules) by concluding that the Trade Practice Rule providing that down fiber should not be included as down takes precedence; * * *"

This interpretation of the Trade Practice Rules explains the Hearing Examiner's language:

> "* * * The two experts who performed Respondent's analyses, did not follow these procedures, and failed to separate the samples of pillow contents tested by them into all the component parts. Their test results cannot be accepted as accurate * * *" (Tr. 24).

To explain Petitioners understanding of the applicability of the *Burton-Dixie* decision quoted above, it is necessary to briefly review the procedure followed by Petitioners' expert witnesses. Both of Petitioners expert witnesses followed the *recommended* testing procedure noted in the Commission's Trade Practice Rules. However, when Petitioners' experts reduced their analyses and tests results to paper, they deviated slightly from the *suggested* procedure of reporting separation noted in the Trade Practice Rules. Neither the Hearing Examiner nor the counsel for the Commission indicated that Petitioners' expert witnesses had utilized invalid or improper testing procedures.

However, the Commission in deciding the *Burton-Dixie* case, as quoted above, interpreted the Trade Practice Rules as taking precedence over any other testing procedure which differed from that suggested by the Trade Practice Rules. Thus the Hearing

Examiner and the Commission, relying upon their ruling in the *Burton-Dixie* case determined that Petitioners' expert testimony should be ignored for the reason that the written summarization of same was slightly different than that recommended by the Trade Practice Rules. After the Commission's decision in the instant matter demonstrated the above mentioned reasons for rejecting Petitioners' expert testimony, Petitioners were able to assign the specific reasons for objecting to the Initial Decision. These reasons appear as the Petitioners' grounds on which review was sought in the United States Court of Appeals for the District of Columbia Circuit.

It should have been apparent to the Court of Appeals for the District of Columbia Circuit that Petitioners were not taking a position before that court different from the one taken before the Commission. In both instances Petitioners urged that it was prejudicial and reversible error for the Hearing Examiner to have arrived at his decision without considering Petitioners' expert testimony and thus, not on the whole record. The sole difference between Petitioners' pleadings before the Commission and the Court of Appeals was a matter of form and not substance. In other words, Petitioners urged in both cases that the decision should be reversed but the Petitioners were not able to phrase their objections in precise language until the Commission's Decision, citing the *Burton-Dixie* case, explained the rejection of Petitioners' evidence.

This Court has on numerous occasions insisted that an administrative agency must make specific and detailed findings of fact in order to apprise parties definitely as to the basis for the administrative

decision. Petitioners do not believe that the Commission met this requirement in the instant matter. The Court of Appeals for the District of Columbia Circuit was in error in not considering this case on the merits for the reason that Petitioners couched their appeal for review in concise and specific language at the first opportunity to do so in this proceeding. The Court of Appeals for the District of Columbia Circuit decision has the effect of protecting an administrative agency in its failure to particularize its findings in contravention of decisions of this Court.

The effect of all the foregoing facts and circumstances has been to allow the chance selection of a particular Circuit Court of Appeals by a litigant, to determine whether or not the litigant is bound by the Respondent's interpretation of its Trade Practice Rules for the Feather and Down Products Industry. It is submitted that a writ of certiorari should issue in this case so that this Court may resolve this intolerable situation concerning the industry and the orderly administration of justice.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13305

BARCLAY HOME PRODUCTS, INC., et al., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of
The Federal Trade Commission

Decided February 14, 1957

Mr. F. Murray Callahan with whom *Mr. Benjamin H. Dorsey* was on the brief, for petitioners. *Mr. Ralph E. Becker* also entered an appearance for petitioners.

Mr. A. L. Berman, Attorney, Federal Trade Commission, with whom *Mr. Robert B. Dawkins,* Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent. *Mr. Joseph B. Kennedy,* Attorney, Federal Trade Commission, also entered an appearance for respondent.

Before BAZELON, FAHY and BASTIAN, Circuit Judges.

PER CURIAM: This petition, by a member of the Feather and Down Products Industry, seeks to set aside a Federal Trade Commission order[1] to cease and desist from engaging in certain unfair labelling practices. The order was based upon the Commission's determination that petitioner's labels, describing the kinds or types and pro-

[1] Issued under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

portions of filling materials contained in pillows, did not meet the standards of accuracy under the Trade Practice Rules for the Feather and Down Products Industry.[2]

In this court petitioner relies on grounds which stem from the Commission's acceptance of the results of tests conducted by its own expert witness and the rejection of those conducted by petitioner's experts.[3] These grounds were not urged before the Commission. We are, therefore, not bound to consider them now.[4]

We note our agreement, however, with the Courts of Appeals for the Third and Second Circuits[5] in sustaining the Commission's like evaluation of these tests in related cases involving other members of this industry.

The petition to set aside is denied, and the Commission's order is affirmed.

So ordered.

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[2] Promulgated by the Commission on April 26, 1951, 16 C.F.R. § 200 (Supp. 1955).

[3] These grounds are: "(1) that testimony of petitioners' experts had been totally disregarded because it was not styled in a manner made mandatory subsequent to its introduction; (2) that testimony of petitioners' experts had never been weighed; and (3) that rejection of testimony of petitioners' experts constituted an amendment to the Trade Practice Rules without notice to petitioners."

[4] *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *Democrat Printing Co.* v. *Federal Communications Comm'n*, 91 U.S. App. D.C. 72, 77-78, 202 F. 2d 298, 303-04 (1952).

[5] *Northern Feather Works* v. *Federal Trade Comm'n*, and *Sumergrade* v. *Federal Trade Comm'n*, 234 F. 2d 335 (3d Cir. 1956); *Buchwalter* v. *Federal Trade Comm'n*, *The L. Buchman Co.* v. *Federal Trade Comm'n*, *and Sanitary Feather & Down Co.* v. *Federal Trade Comm'n*, 235 F. 2d 344 (2d Cir. 1956). *Contra: Burton-Dixie Corp.* v. *Federal Trade Comm'n*, —— F. 2d —— (7th Cir., Jan. 10, 1957); *Lazar* v. *Federal Trade Comm'n*, —— F. 2d —— (7th Cir., Jan. 10, 1957.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 13,305

BARCLAY HOME PRODUCTS, INC., and ALEXANDER BUCHMAN, and LOUIS BUCHMAN, individually and as officers of said Corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Review of an Order of the Federal Trade Commission

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JOINT APPENDIX

Petition for Review

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Petitioners, Barclay Home Products, Inc., a corporation organized and existing under and by virtue of the laws of the State of New York, and Alexander Buchman and

Louis Buchman, individually and as officers of said corporation, petition this Honorable Court for review of the order of the Federal Trade Commission, (Commission Docket No. 6275), dated February 27, 1956, and, as a basis for its petition shows:

I. Nature of Proceedings

On December 28, 1954, the Federal Trade Commission issued its Complaint against the above-named Petitioners charging them with unfair and deceptive acts and practices and unfair methods of competition in that Respondents' pillows designated "Greylark," to which Respondents attached a label stating "All new material consisting of down" contained substantial quantities of material other than down; and that Respondents' pillows designated "Lucerne" to which Respondents attached a label stating "All new material consisting of White Goose Down—50% White Goose Feathers," contained substantially less than 50% goose down.

Respondents filed an Answer to this Complaint denying that the pillows are falsely or deceptively labelled and denying that the filling material is other than as represented, taking into consideration the 15% tolerance established by the Federal Trade Commission's Trade Practice Rules for the Feather and Down Products Industry.

Issue having been joined, the hearing of the case commenced April 14, 1955. During the hearing Respondents presented two expert witnesses who testified that the contents of Respondents' pillows were well within the 15% tolerance, established by the Trade Practice Rules. The Commission presented an expert witness who testified that the contents of Respondents' pillows were not within the 15% tolerance.

The Initial Decision and Order by the Hearing Examiner, August 5, 1955, held that Respondents' experts did not follow each and every particular of testing procedure noted in the Trade Practice Rules, that the Commission's

expert had followed the noted procedure and, therefore, decided that "the test results (of respondents' expert witnesses) cannot be accepted as accurate, and the test results of the expert who testified in support of the Complaint, therefore, must be accepted as representative of the contents of the pillows tested." It should be noted that the testing procedure noted in the Trade Practice Rules is therein stated to be "*a* proper method of testing such product". (Emphasis supplied). Neither counsel for the Federal Trade Commission nor the Hearing Examiner ever questioned the qualifications of Respondents' expert witnesses or the propriety or accuracy of their testing methods during the hearings.

Following such Initial Decision, Petitioner and Respondent filed briefs before the Commission and argued orally. On February 27, 1956, the Commission issued its Decision affirming the Initial Decision.

II. Facts Upon Which Venue Is Based

Jurisdiction of the case is provided for by the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which provides that such an order may be reviewed by the Court of Appeals "within any circuit where the * * * act or practice in question was used * * *".

As alleged in the Complaint and admitted in the Answer, Petitioner sells, distributes and advertises its pillows under the trade names "Greylark" and "Lucerne" throughout the United States; in particular, Respondent sells the aforesaid pillows to the major department stores of the District of Columbia.

III. Grounds On Which Relief Is Sought

1. Petitioners were denied a full and fair hearing because the Respondent has treated the suggested testing method noted in the Trade Practice Rules as the only testing method whose results could be given weight.

2. Petitioners were denied a full and fair hearing because the testimony of Petitioners' expert witnesses was totally disregarded while the testimony of Respondents' expert witnesses was given controlling weight when, in fact, the tests used by all expert witnesses were substantially identical.

3. Had the testimony of Petitioners' expert witnesses been given the weight to which it was entitled, Respondent could not have met the burden of proof required by the Commission's rules.

IV. Relief Prayed

Petitioners respectfully pray that this Honorable Court review the proceedings, order and decision identified above, and that this Honorable Court set aside said order and decision.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Stipulation

It is hereby stipulated and agreed by and between the parties:

I. That they are unable to agree upon a statement of the issues involved. Counsel for petitioners does agree, however, that the sole issues to which he will address himself are those which are set forth as the "GROUNDS ON

WHICH RELIEF IS SOUGHT" on page 4 of the Petition for Review.

II. That the procedure to govern the filing of briefs and joint appendix shall be as follows:

A. Within 10 days after entry of the prehearing order in this matter petitioners shall file with the court and serve upon counsel for respondent their designation of the parts of the record in this and the related cases which petitioners desire the court to read.

B. Within 10 days thereafter respondent shall file with the court and serve upon counsel for petitioners a designation of such additional parts of the record, if any, which respondent desires the court to read.

C. Within 45 days after service of respondent's counter designation counsel for petitioners shall file with the court and serve upon respondent one copy each of their typewritten brief with references to the transcript of record.

D. Forty-five days thereafter counsel for respondent shall file with the court and serve upon petitioners one copy each of their typewritten brief with references to the transcript of record.

E. Ten days thereafter counsel for petitioners may file with the court and serve upon respondent one copy each of their typewritten reply brief, if any.

III. Within five days after typewritten briefs have been filed and served, counsel shall confer with a view to conforming the designations of record previously filed by both parties with the matters contained in the typewritten briefs. Thereafter, counsel for either party may within five days file with the court and serve on the other party such amendments if any to their designations as they deem necessary.

IV. In order to avoid unnecessary printing costs in the statement or counter statement of the case in the printed briefs, the manufacturing methods and the competitive practices of the industry which are pertinent to a proper consideration of the case may be referred to by citation to the transcript of record and need not be printed in the joint appendix. The Trade Practice Rules for the Feather and Down Products Industry may be referred to by citation to the Code of Federal Regulations or the joint appendix.

V. Counsel for petitioners shall be responsible for having the record as finally designated printed as a joint appendix within 20 days of service of respondent's amended designation, if any, or notice from respondent that no amendment is desired.

VI. Five days after the joint appendix is printed petitioners shall file with the court and serve upon the respondent the required number of copies of the printed joint appendix.

VII. Counsel for both parties shall then paginate the typewritten briefs in accordance with the pagination of the joint appendix and shall file with the court and serve upon one another the required number of copies of the printed briefs within 20 days.

VIII. Thereafter the matter may be set for oral argument at the court's convenience.

Respectfully submitted,

BARCLAY HOME PRODUCTS, ET AL.

By

BENJAMIN H. DORSEY,
Attorney for Petitioners.

FEDERAL TRADE COMMISSION

By

ROBERT B. DAWKINS,
Assistant General Counsel.

.....

JOSEPH B. KENNEDY, JR.,
Attorney.

Dated: July 19, 1956

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * *

Order

Upon consideration of a stipulation by the parties governing the issues involved in this case, the manner of designation of the record and the time and manner of preparation of typewritten and printed briefs and the joint appendix, together with the time for the filing thereof, and it appearing that said stipulation has been lodged with the clerk, it is

ORDERED that the aforesaid stipulation be approved, and that the clerk be directed to file said stipulation forthwith.

It is FURTHER ORDERED that this order and the stipulation be printed in the joint appendix and shall govern further proceedings in this case.

JOHN A. DANAHER,
Circuit Judge.

Dated: July 10, 1956

2

UNITED STATES OF AMERICA

BEFORE FEDERAL POWER COMMISSION

Docket No. 6275

In the Matter of

BARCLAY HOME PRODUCTS, INC., a corporation, and ALEXANDER BUCHMAN and LOUIS BUCHMAN, individually and as officers of said corporation.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Barclay Home Products, Inc., a corporation, and Alexander Buchman and Louis Buchman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent Barclay Home Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at North Mohawk Street, Cohoes, New York. Respondents Alexander and Louis Buchman are the officers of said corporate respondent. Their address is the same as that of the corporate respondent. These individuals formulate and direct the policies, acts, practices and business affairs of said corporate respondent, including the acts and practices hereinafter set out.

PARAGRAPH TWO: Respondents are now and for more than one year last past have been engaged in the manufac-

ture and sale of pillows and other products, designated as down and feather products, to dealers for resale to the general public. Respondents have caused and now cause their said products, when sold to be transported from their place of business in the State of New York to purchasers thereof located in other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said down and feather products, in commerce, among and between the various States of the United States.

PARAGRAPH THREE: In the course and conduct of their aforesaid business respondents are now, and have been, in competition in commerce with others engaged in the manufacture, sale and distribution of down and feather products, including pillows.

PARAGRAPH FOUR: In the course and conduct of their business, respondents have caused labels to be affixed to their pillows purporting to state and set out the kinds or types and proportions thereof of filling material contained therein. Typical of the statements appearing on the labels of two pillows designated "Greylark" is the following:

"All New Material Consisting of Down";

and on the labels of two pillows designated "Lucerne":

"All New Material Consisting of

White Goose Down—50%
White Goose Feathers—50%."

PARAGRAPH FIVE: Through the use of the aforesaid statements appearing on the labels affixed to said pillows, respondents represent that the filling material in the pillows designated "Greylark" is composed of all down and that the filling material in the pillows designated "Lucerne" is composed of 50% white goose down and 50% white goose feathers.

PARAGRAPH SIX: The aforesaid representations are false, misleading and deceptive. In truth and in fact, respond-

ents' "Greylark" pillows contain substantial quantities of material other than down and the pillows designated "Lucerne" contain substantially less than 50% goose down.

PARAGRAPH SEVEN: The use by respondents of the aforesaid false, misleading and deceptive representations on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public as to the composition of the filling material of their said pillows and to induce the purchase of substantial quantities of their said pillows because of such mistaken and erroneous belief.

4 As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done to competition in commerce.

PARAGRAPH EIGHT: The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 28th day of December, A. D., 1954, issues its complaint against said respondents.

NOTICE

Notice is hereby given you, Barclay Home Products, Inc., a corporation, and Alexander Buchman and Louis Buchman, individually and as officers of said corporation, respondents herein, that the 15th day of March, A. D., 1955, at 10 o'clock is hereby fixed as the time and Baltimore, Maryland as the place when and where a hearing will be had before J. Earl Cox, a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order

should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. Such answer shall contain a concise statement of the facts which constitute on the ground for defense and shall specifically admit or deny each of the facts alleged in the complaint unless you are without knowledge, in which case you shall so state. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

If respondents desire to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondents admit all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondents may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or of law under Rule XXI, and the right to appeal under Rule XXIII.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission and Hearing Examiner J. Earl Cox, without further notice, to find the facts to be as alleged herein and to issue the following order in this proceeding:

It Is Ordered that Barclay Home Products, Inc., a corporation, and its officers, and Alexander and Louis Buchman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in com-

merce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' feather and down products, do forthwith cease and desist from:

Misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type; provided, however, that the applicable provisions of the Trade Practice Rules for the Feather and Down Products Industry, promulgated by the Commission on April 26, 1951, shall be recognized and taken into account in connection with compliance with this order.

The inclusion of such order to cease and desist in this complaint will be without effect in the event you show cause, on or before the 15th day of March, A. D., 1955, why such order should not issue.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 28th day of December, 1954.

By the Commission.

ROBERT M. PARRISH,
Secretary.

9 Received March 1, 1955

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 6275

In the Matter of

BARCLAY HOME PRODUCTS, INC.,
A CORPORATION, ET AL.

Answer

Now come the respondents, Barclay Home Products, Inc., and Alexander Buchman and Louis Buchman, individually and as officers of said corporation, and, for answer to the complaint served upon them on or about January 6, 1955, deny that they, or any of them, have violated the Federal Trade Commission Act as alleged, deny that this proceeding is in the public interest, and, in answer to the allegations of said complaint, state:

1. Admit each and every allegation of paragraph 1 of the complaint.
2. Admit each and every allegation of paragraph 2 of the complaint.
3. Admit each and every allegation of paragraph 3 of the complaint.
4. Admit each and every allegation of paragraph 4 of the complaint.
5. Admit each and every allegation of paragraph 5 of the complaint.
6. Deny each and every allegation of paragraph 6 of the complaint.
7. Deny each and every allegation of paragraph 7 of the complaint.
8. Deny each and every allegation of paragraph 8 of the complaint.

10 AS AND FOR AN AFFIRMATIVE DEFENSE

A. Respondents' pillows specified in the complaint contain filling material substantially as, or in the proportion, indicated on the labels, respectively, taking into consideration the 15% tolerance provided in the Trade Practice Rules.

B. There is reliable, probative and substantial evidence contained in the records of a number of similar cases now pending before the Commission (see for example Docket No. 6134) that:

(a) The exact amount or proportion of down and feathers going into any particular pillow cannot be controlled by mechanical means.

(b) There is no sure or positive method of measuring the contents of feather pillows with scientific accuracy, other than by impractical processes.

(c) No sample can be exactly representative of the original content of the pillow, just as the content of one pillow can be exactly representative of the original mixture in the filling bin.

(d) The method of sampling now used in the industry is not satisfactory, and the resulting percentages are not conclusive.

(e) It is impossible, as a practical matter, to accurately label the contents of feather pillows.

C. It is in the mutual interest of the public, the Commission and respondents that the other similar cases be reviewed by the Commission prior to any further proceedings in this matter, in view of the unwarranted expense, injury and inconvenience to the parties which otherwise will be incurred.

D. Respondents are in entire good faith in connection with all their policies, acts, practices and business affairs,

including the acts and practices set out in the complaint and at all times have complied with all practical standards, tests, methods, procedures, practices and customs of the industry, including the Trade Practice Rules promulgated April 26, 1951.

E. In the course and conduct of their business, respondents have not violated the Federal Trade Commission Act, or any of the rules or regulations issued thereunder, or any other laws, state or federal.

11 WHEREFORE it is prayed that the complaint herein be dismissed or that the Commission take such other action including an order for the deferring of all further proceedings herein until said other cases are finally reviewed and decided on appeal or otherwise, as it may deem just and proper in the premises.

BARCLAY HOME PRODUCTS, INC.
ALEXANDER BUCHMAN
LOUIS BUCHMAN

By RALPH E. BECKER
Ralph E. Becker

Dated: Washington, D. C., March 1, 1955

RALPH E. BECKER LAW OFFICES
Ralph E. Becker Law Offices
Attorneys for said Respondents

Ralph E. Becker
Ralph E. Becker Law Offices
1346 Connecticut Avenue, N. W.
Washington 6, D. C.
CO 5-7641

17 Received August 5, 1955

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 6275

In the Matter of

BARCLAY HOME PRODUCTS, INC.,

A CORPORATION, AND

ALEXANDER BUCHMAN AND LOUIS BUCHMAN

INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION.

Initial Decision

By J. EARL COX, *Hearing Examiner*

The complaint in this proceeding charged the respondent corporation and its officers with having engaged in unfair and deceptive acts and practices and unfair methods of competition to the injury of the public and respondents' competitors through having falsely represented on labels attached to their feather and down pillows the kinds or types of filling material, and percentages of each, contained in such pillows. The respondents filed their answer admitting the jurisdictional allegations of the complaint, as well as the use of the representations alleged to have been false, but denied the falsity thereof. By stipulation it was agreed that there may be considered as part of the record in this case those portions of the records in certain other cases[1] "which relate to the feather and down industry generally, the practices in that industry,

[1] The other related cases are:

Docket 6132, National Feather & Down Company;
Docket 6133, The L. Buchman Co., Inc., et al.;
Docket 6134, Burton-Dixie Corp., et al.;
Docket 6135, N. Sumergrade & Sons, et al.; and
Docket 6137, Northern Feather Works, Inc., et al.

methods of sampling and analysis of feather and down products, the qualifications of and methods of analysis used by J. Davis Donovan and his associates". The filing of proposed findings of fact, conclusions and order was waived by counsel. On the basis of the entire record, this proceeding is found to be in the interest of the public, and the following findings of fact are made:

1. Respondent Barclay Home Products, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York,
18 with its office and principal place of business located at North Mohawk Street, Cohoes, New York. Respondents Alexander and Louis Buchman are the officers of said corporate respondent. Their address is the same as that of the corporate respondent. These individuals formulate and direct the policies, acts, practices and business affairs of said corporate respondent, including the acts and practices hereinafter set out.

2. Respondents are now and for more than one year last past have been engaged in the manufacture and sale of pillows and other products, designated as down and feather products, to dealers for resale to the general public. Respondents have caused and now cause their said products, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other states of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said down and feather products, in commerce, among and between the various states of the United States.

3. In the course and conduct of their aforesaid business respondents are now, and have been, in competition in commerce with others engaged in the manufacture, sale and distribution of down and feather products, including pillows.

4. In the course and conduct of their business, respondents have caused labels to be affixed to their pillows purporting to state and set out the kinds or types and proportions thereof of filling material contained therein. Typical of the statements appearing on the labels of two pillows designated "Greylark" is the following:

"All New Material Consisting of Down";

and on the labels of two pillows designated "Lucerne":

"All New Material Consisting of
White Goose Down 50%
White Goose Feathers 50%

5. Through the use of the aforesaid statements appearing on the labels affixed to said pillows, respondents represent that the filling material in the pillows designated "Greylark" is composed of all down, and that the filling material in the pillows designated "Lucerne" is composed of 50% white goose down and 50% white goose feathers.

6. Two pillows designated "Greylark" and two designated "Lucerne", which were manufactured by respondents, were procured by a representative of the Commission at the same time from the same retail dealer, and were introduced in evidence. The contents of these four pillows were analyzed by an expert, Mr. J. Davis Donovan, for the Commission. Respondents removed samples
19 of filling material from each of these four pillows, and sent two of such samples, one taken from a "Greylark" pillow and one from a "Lucerne" pillow, to each of two experts, U. S. Testing Company, Inc., and Charles D. Pomerantz, for analysis. The analyses made by the Commission's expert showed as follows:

Pillows Designated "Greylark"

	Pillow 1 (by weight	Pillow 2 (by weight)
Down	82.2%	83.0%
Feathers	15.0%	13.7%
Feather fiber	1.4%	2.6%
Pith and scale	1.4%	0.7%

Respondents' experts made analyses of the contents of the two "Greylark" pillows, which showed the following:

	Pillow 1	Pillow 2
Down and down fiber (fiber not separated)	91.9%	90.2%
Feathers	8.1%	9.8%

With respect to respondents' pillows designated "Lucerne", the analyses were as follows:

	Pillow 3	Pillow 4
By the Commission's expert:		
Down	36.2%	36.4%
Goose feathers	52.0%	55.4%
Damaged feathers	6.8%	3.9%
Chicken feathers	0.5%	0.6%
Fiber	3.2%	1.8%
Pith and scale	1.3%	1.9%
By respondents' experts:		
Feathers	50.9%	56.0%
Down and down fiber	49.1%	44.0%

7. There are three sources of raw feather supplies upon which respondents are, or have been, drawing. These three sources are domestic, European, and Oriental. Use of domestic feathers ordinarily does not result in labeling problems but that source does not furnish sufficient quan-

tities to meet industry requirements. It is the practices followed in the gathering and sale of European and Oriental feathers, taken together with the procedures followed by pillow manufacturers in this country in the handling and processing of imported raw feathers, that have resulted in the alleged mislabeling in violation of Section 5 of the Federal Trade Commission Act which is sought to be corrected in this, and related, proceedings covering practically all pillow production in the industry.

(1) It is the custom of industry members to purchase European feathers on the basis of samples from which the quality and type of offerings are determined, through visual examination or laboratory analysis of the samples, by each manufacturer. All new stock is seldom available from European markets, it being the common practice there to mix second-hand feathers with new.

(2) Oriental feathers are purchased by manufacturers through importers and commission merchants who circularize the industry on the basis of "offers" (without samples). A typical offer would be 100 two-hundred-pound bales of Formosan grey goose feathers at 90¢ a pound, 90% clean, 20% maximum of duck feathers, 5% chicken feathers, 3% quills, and a minimum of 30% down. Quality and type are determined, after purchase, by each manufacturer through visual examination or laboratory analysis of samples from 10% of the bales selected at random from the lot. Oriental feathers are not carefully sorted and a bale represented as goose feathers may, and usually does, contain substantial quantities of duck and chicken feathers.

(3) The first step in processing feathers after purchase is for the manufacturer to dust, wash, sterilize, dry, and fluff them by mechanical means. They are then sorted into various bins or containers, customarily in lots of fifty pounds, through blowing or suction processes. Feathers of similar weight and specific gravity theoretically are

deposited in the same bins or containers after being blown over baffles in the sorting. Types of pillow-filling materials recognized in the industry in the order of their relative intrinsic value or utility are:

(a) *down* — waterfowl undercoating — clusters of light, fluffy filaments attached to one quill point but without any quill shaft;

(b) *down fiber*—down plumes or filaments separated from quill points, without any quill;

(c) *waterfowl feathers*—goose, duck, or a mixture of both;

(d) *natural feathers*—bird or fowl, having quill shafts and barbs;

(e) *quill feathers*—wing or tail feathers, or any mixture of both;

(f) *crushed feathers* — feathers, including quills, crushed or curled by machine;

21 (g) *feather fiber* — feather barbs separated from quill shaft;

(h) *damaged feathers*—other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

(4) It is reasonably practical to segregate high percentages of the various types of feathers and down into appropriate classification bins or containers. However, feathers cannot be segregated as to type of fowl or as to inferior or second-hand material. Feathers of the same degree of lightness, applying principles of specific gravity, will go over sorting-machine baffles at the same time regardless of whether they are from watefowl or landfowl or whether they are new or used. And, in each sorting bin or container, there will be some down and some heavier type feathers inappropriate to the particular classification. Further, in each sorting bin or container, the mixture will not consistently be of uniform content or bulk. Heavier feathers will be at the bottom and downy material at the

top in lesser or greater degree. This is true even though there be vigorous agitation of the material in each sorting bin or container.

(5) A manufacturer may fill from 1,200 to 1,400 *pairs* of pillows a day. In making up a pillow order the desired mixture is obtained by placing in each filling bin, holding up to about 400 pounds, the requisite number of bags of each type of feather sufficient to produce from two to three hundred pillows.

(6) Pillows usually are filled from two spouts fed by suction from the filling bin. During the filling process feathers in the filling bin are agitated with wooden forks when contents of the filling bin get to the level where that is possible. Even so, pillows filled from the same bin will vary in content. At the bottom of the bin will be collected the heavier feathers and the greater amounts of pith, scale, and other extraneous matter.

8. Prior to 1951 the Federal Trade Commission, upon application of the industry, held a trade practice conference, as a result of which trade practice rules for the industry were formulated through the cooperative efforts of industry members and the Commission's staff. The Commission approved these rules, and they were promulgated April 26, 1951, as a revision and supplementation of, and as superseding, 1932 trade practice rules for the Feather and Down Products Industry. These rules are interpretations of the laws administered by this Commission and express Commission policy with respect to the practices involved in this proceeding.

(1) The trade practice rules, in pertinent part, provide substantially as follows. It is an unfair practice to misrepresent or conceal identity of the kind or type of feather or down, and proportions of each, when pillow-filling
22 material is a mixture of more than one kind or type. Identification and disclosure is required to be made

by tag or label as well as on invoices and all advertising and trade promotional literature. The rules permit listing each kind or type in order of its predominance by weight or by fraction or percentage by weight of the entire mixture. The rules define the kinds and type of feather and down stock in terms substantially as outlined above. They provide that a pillow may be represented as being filled with one kind or type of filling material when 85% of all such material contained therein is of the represented kind or type *or* that the filling material may be represented as a mixture of kinds or types with accompanying disclosure of the percentage by weight of the entire mixture represented by each if the percentage shown:

> "is not at variance with the actual proportion of the weight of the entire mixture, represented by each such kind or type by more than *15% of the stated* * * * *percentage*" (Emphasis supplied).

The rules parenthetically state that this tolerance is to allow for error and not for any intentional adulteration.

(2) By way of limitation, or restriction, the rules provide that:

> (a) When a pillow is represented as *all down*, any proportion of the 15% tolerance which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers and that the 15% tolerance shall not contain in excess of 2% each, or 5% in the aggregate, of damaged feathers, quill pith, quill fragments, trash or foreign material;
>
> (b) When a pillow is represented as a mixture of down and feathers, or as a mixture of feathers, any proportion, or aggregate of proportions, of the filling material at variance with the representations, but within the 15% tolerance, shall not contain in excess of 2% each, or 5% in the aggregate, of quill pith, quill fragments, trash or foreign material. It is further provided with regard to mixed filling materials

that, unless disclosed, not more than 5% thereof shall consist of crushed, chopped, quill, or damaged feathers.

(3) Finally, the rules provide that, in testing feather and down content of pillows, samples of equal weight and size shall be drawn from three locations in each pillow; that the samples shall be thoroughly mixed; and that not less than three grams of the resulting mixtures shall be tested. At least two pillows of the same type are required to be tested separately with the conclusions to be drawn therefrom to be based on an average of the test results.

23 9. The expert who analyzed the samples of pillow-filling material for the Commission and testified in support of the allegations of the complaint followed the procedures prescribed in the Trade Practice Rules for the Feather and Down Products Industry, whereas the two experts who performed respondents' analyses did not follow these procedures, and failed to separate the samples of pillow contents tested by them into all the component parts. Their test results cannot be accepted as accurate, and the test results of the expert who testified in support of the complaint, therefore, must be accepted as representative of the contents of the pillows tested.

10. The average of his analyses of the contents of the two "Greylark" pillows shows down content of 82.6%. Under the Trade Practice Rules, it should be not less than 85%; hence the labeling of these pillows as "All New Material Consisting of Down" must be found to be false, misleading and deceptive. The average of the contents of the two pillows designated "Lucerne" shows down content of 36.3% and goose-feather content of 53.7%. Even taking into account the 15% tolerance, the down content of these two pillows is less, and the goose-feather content is more, than that stated on the labels, and, accordingly, the labeling of the "Lucerne" pillows must likewise be found to be false, misleading and deceptive.

Conclusions

The use by respondents of the aforesaid false, misleading and deceptive representations on the labels affixed to their pillows has had and now has the tendency and capacity to mislead and deceive dealers and the purchasing public as to the composition of the filling material of said pillows, and to induce the purchase of substantial quantitles of their pillows because of such mistaken and erroneous belief.

The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. Accordingly,

It is ordered that the respondents, Barclay Home Products, Inc., a corporation, and Alexander Buchman and Louis Buchman, individually and as officers of said corporation, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of feather and down products, do forthwith cease and desist from misrepresenting in any manner, or by any means, directly or by implication, the identity of the kind or type of filling material contained in any such products, or of the kinds or types, and proportions of each, when the filling material is a mixture of more than one kind or type.

J. Earl Cox,
Hearing Examiner.

August 5, 1955.

75 UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: John W. Gwynne, Chairman, Lowell B. Mason, Robert T. Secrest, Sigurd Anderson, William C. Kern

Docket No. 6275

In the Matter of

BARCLAY HOME PRODUCTS, INC.,
A CORPORATION, AND

ALEXANDER BUCHMAN AND LOUIS BUCHMAN
INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION.

Final Order

The respondents having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral argument, and the Commission having rendered its decision denying the appeal and affirming the initial decision:

IT IS ORDERED that the respondents shall, within sixty (60) days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

By the Commission, Commissioner Secrest not participating.

ROBERT M. PARRISH,
Secretary.

Issued: February 27, 1956.

76 UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: John W. Gwynne, Chairman, Lowell B. Mason, Robert T. Secrest, Sigurd Anderson, William C. Kern

Docket No. 6275

In the Matter of

BARCLAY HOME PRODUCTS, INC.,
A CORPORATION, AND

ALEXANDER BUCHMAN AND LOUIS BUCHMAN
INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION.

On Appeal From Initial Decision

Per Curiam:

This case is similar to a number of other cases, all tried and considered together,[1] involving the use on labels of allegedly false and deceptive representations with respect to the filling material contained in feather and down pillows.

Except as to the results of the analyses of the different pillows used as exhibits, as to which the record in each of the cases is specific and definite, this case is not unlike the cases of Burton-Dixie Corporation, et al., D. 77 6134, and Bernard H. Sumergrade and Harry Sumergrade, copartners trading as N. Sumergrade & Sons, D. 6135, in which the Commission has written

[1] In deciding this matter the Commission to the extent permitted by stipulation of counsel, entered on the record on April 14, 1955, considered the relevant portions of the records in the following related proceedings which are identified by principal respondents as:

D. 6132 National Feather & Down Company;
D. 6133 The L. Buchman Co., Incorporated,
D. 6134 Burton-Dixie Corporation, et al.,
D. 6135 N. Sumergrade & Sons,
D. 6137 Northern Feather Works, Inc.

opinions setting forth in some detail its views on the issues involved. The similarity between the Burton-Dixie Corporation and Sumergrade cases and the instant matter renders the opinions in those cases equally applicable here, and for the reasons there stated the Commission is of the view that the hearing examiner correctly concluded that the respondents have misrepresented the contents of certain of their pillows in violation of the Federal Trade Commission Act and that the order to cease and desist contained in the initial decision is appropriate.

Accordingly, the respondents' appeal is denied and the initial decision is affirmed.

Commissioner Secrest did not participate in the decision of this matter.

February 27, 1956.

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863 UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Edward F. Howrey, Chairman, Lowell B. Mason, James M. Mead, John W. Gwynne, Robert T. Secrest

Docket No. 6134

In the Matter of

BURTON-DIXIE CORPORATION
A CORPORATION,

JOHN G. SEVICK, A. T. BURTON, GEORGE S. KNOTT, OSCAR D. WILEY, GEORGE W. GARTZ, AND IRA W. SPACKEY, INDIVIDUALLY.

On Appeal From Initial Decision

By Secrest, Commissioner:

The complaint in this proceeding charged the respondent corporation and its several officers with having engaged in unfair and deceptive acts and practices and unfair

methods of competition to the injury of the public and respondents' competitors through having falsely represented on labels attached to their feather and down pillows the kinds or types of filling material, and percentages of each, contained in such pillows. The respondents filed their answer admitting the jurisdictional allegations of the complaint, as well as the use of the representations alleged to have been false, but denied the falsity thereof. By stipulation it was agreed that:

> "* * * there may be considered as part of the record in this case those portions of the records in the following cases, which relate to the feather and
> 864 down industry generally, the practices in that industry, methods of sampling and analysis of feather and down products, the qualifications of and methods of analysis used by J. Davis Donovan and his associates, and the qualifications of the employees of and methods of analysis used by United States Testing Co., it being intended to include in this stipulation all of such records except those portions relating specifically to the particular pillows involved therein and the results of their analysis: Dockets 6132, 6133, 6135, 6136, 6137, and 6208."[1]

The instant case was tried before a hearing examiner of the Commission who, on December 6, 1954, filed his initial decision dismissing the complaint. From that initial decision counsel in support of the complaint has prosecuted this appeal.

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[1] Further identified by principal respondents as:

D. 6132—National Feather & Down Co.
D. 6133—The L. Buchman Co., Incorporated, et al.
D. 6135—N. Sumergrade & Sons.
D. 6136—Premier Pillow Corporation, et al.
D. 6137—Northern Feather Works, Inc., et al.
D. 6208—Sanitary Feather & Down Co., Inc.
N.B. Other related cases not included in this stipulation are:
D. 6161—The Salisbury Company, et al.
D. 6188—Globe Feather & Down Company.
D. 6189—Columbia Bedding Company, et al.

The hearing examiner found substantially as follows with regard to the industry background. There are three sources of raw feather supplies upon which respondents are, or have been, drawing. Those three sources are domestic, European, and Oriental. Use of domestic feathers ordinarily does not result in labeling problems but that source does not furnish sufficient quantities to meet industry requirements. It is the practices followed in the gathering and sale of European and Oriental feathers, taken together with the procedures followed by pillow manufacturers in this country in the handling and
865 processing of imported raw feathers, that have resulted in the alleged mislabeling in violation of Section 5 of the Federal Trade Commission Act which is sought to be corrected in this, and related, proceedings covering practically all pillow production in the industry.

It is the custom of industry members to purchase European feathers on the basis of samples from which the quality and type of offerings are determined, through visual examination or laboratory analysis of the samples, by each manufacturer. All new stock is seldom available from European markets, it being the common practice there to mix second-hand feathers with new.

Oriental feathers are purchased by manufacturers through importers and commission merchants who circularize the industry on the basis of "offers" (without samples). A typical offer would be 100 two-hundred-pound bales of Formosan grey goose feathers at 90¢ a pound, 90% clean, 20% maximum of duck feathers, 5% chicken feathers, 3% quills, and a minimum of 30% down. Quality and type are determined, after purchase, by each manufacturer through visual examination or laboratory analysis of samples from 10% of the bales selected at random from the lot. Oriental feathers are not carefully sorted and a bale represented as goose feathers may, and usually does, contain substantial quantities of duck and chicken feathers.

The first step in processing feathers after purchase is for the manufacturer to dust, wash, sterilize, dry, and fluff them by mechanical means. They are then sorted into various bins or containers, customarily in lots of fifty pounds, through blowing or suction processes. Feathers of similar weight and specific gravity theoretically are deposited in the same bins or containers after being blown over baffles in the sorting. Types of pillow filling materials recognized in the industry in the order of their relative intrinsic value or utility are:

(1) *down*—waterfowl undercoating—clusters of light, fluffy filaments attached to one quill point but without any quill shaft;

(2) *down fiber*—down plumes or filaments separated from quill points, without any quill;

(3) *waterfowl feathers*—goose, duck, or a mixture of both;

866 (4) *natural feathers*—bird or fowl, having quill shafts and barbs;

(5) *quill feathers*—wing or tail feathers, or any mixture of both;

(6) *crushed feathers*—feathers, including quills, crushed or curled by machine;

(7) *feather fiber*—feather barbs separated from quill shaft;

(8) *damaged feathers*—other than crushed, chopped, or stripped, which are broken, damaged by insects, or otherwise materially injured.

It is reasonably practical to segregate high percentages of the various types of feathers and down into appropriate classification bins or containers. However, feathers cannot be segregated as to type of fowl or as to inferior or second-hand material. Feathers of the same degree of

lightness, applying principles of specific gravity, will go over sorting machine baffles at the same time regardless of whether they are from waterfowl or landfowl or whether they are new or used. And, in each sorting bin or container, there will be some down and some heavier type feathers inappropriate to the particular classification. Further, in each sorting bin or container, the mixture will not consistently be of uniform content or bulk. Heavier feathers will be at the bottom and downy material at the top in lesser or greater degree. This is true even though there be vigorous agitation of the material in each sorting bin or container.

A manufacturer may fill from 1200 to 1400 *pairs* of pillows a day. In making up a pillow order the desired mixture is obtained by placing in each filling bin, holding up to about 400 pounds, the requisite number of bags of each type of feather sufficient to produce from two to three hundred pillows.

Pillows usually are filled from two spouts fed by suction from the filling bin. During the filling process feathers in the filling bin are agitated with wooden forks when contents of the filling bin get to the level where that is possible. Even so, pillows filled from the same bin will vary in content. At the bottom of the bin will be collected the heavier feathers and the greater amounts of pith, scale, and other extraneous matter.

867 The record is not clear as to the exact number but it appears that about twenty-eight states require labeling of the filling material content of feather and down pillows. Massachusetts seems to be the only state requiring labeling that permits the listing on labels of each type or kind of feather and down in the order of its predominance by weight, rather than on a percentage by weight, of the entire mixture. The other states require percentage of weight labeling usually with a 10% tolerance for variance allowed.

Prior to 1951 the Federal Trade Commission, upon application of the industry, held a trade practice conference

as a result of which trade practice rules for the industry were formulated through the cooperative efforts of industry members and the Commission's staff. The Commission approved these rules and they were promulgated April 26, 1951, as a revision and supplementation of, and as superseding, 1932 trade practice rules for the Feather and Down Products Industry. The hearing examiner's initial decision recognizes that these rules are not substantive law and not binding upon him. Such rules are interpretations of the laws administered by this Commission and express Commission policy with respect to the practices involved in this proceeding.

The trade practice rules, in pertinent part, provide substantially as follows. It is an unfair practice to misrepresent or conceal identity of the kind or type of feather or down, and proportions of each, when pillow filling material is a mixture of more than one kind or type. Identification and disclosure is required to be made by tag or label as well as on invoices and all advertising and trade promotional literature. The rules permit listing each kind or type in order of its predominance by weight or by fraction or percentage by weight of the entire mixture. The rules define the kinds and type of feather and down stock in terms substantially as outlined above. They provide that a pillow may be represented as being filled with one kind or type of filling material when 85% of all such material contained therein is of the represented kind or type *or* that the filling material may be represented as a mixture of kinds or types with accompanying disclosure of the percentage by weight of the entire mixture represented by each if the percentage shown:

> "is not at variance with the actual proportion of the weight of the entire mixture represented by each such kind or type by more than *15% of the stated* * * * *percentage.*" (Italics supplied.)

868 The rules parenthetically state that this tolerance is to allow for error and not for any intentional adulteration.

By way of limitation, or restriction, the rules provide that:

(a) When a pillow is represented as *all down*, any proportion of the 15% tolerance which is not down shall consist principally of down fiber and/or small, light, and fluffy waterfowl feathers and that the 15% tolerance shall not contain in excess of 2% each, or 5% in the aggregate, of damaged feathers, quill pith, quill fragments, trash or foreign material.

(b) When a pillow is represented as a mixture of down and feathers, or as a mixture of feathers, any proportion, or aggregate of proportions, of the filling material at variance with the representation, but within the 15% tolerance, shall not contain in excess of 2% each, or 5% in the aggregate, of quill pith, quill fragments, trash or foreign material. It is further provided with regard to mixed filling materials that, unless disclosed, not more than 5% thereof shall consist of crushed, chopped, quill, or damaged feathers.

Finally, the rules provide that, in testing feather and down content of pillows, samples of equal weight and size shall be drawn from three locations in each pillow, that the samples shall be thoroughly mixed and that not less than three grams of the resulting mixtures shall be tested. At least two pillows of the same type are required to be tested separately with the conclusions to be drawn therefrom to be based on an average of the test results.

As previously indicated, it was stipulated that the qualifications of expert witnesses appearing in support of the complaint and in opposition thereto in other related cases, where such qualifications appeared as a matter of record in each, would be considered as part of the record in the instant case. From the composite record resulting, the following facts with regard to qualifications of the two expert witnesses appearing herein are established.

The expert called in support of the complaint testi-

fied that he has been employed by the State of
869 Maryland, Department of Health, since 1916 in various capacities and that he has been Chief, Division of Bedding and Upholstery since June of 1924. When he started in charge of bedding and upholstery, in 1924, he had to do all inspecting, sampling and testing of materials. He has, therefore, had practical experience in each of those categories. His staff now consists of a secretary, two inspectors, and two qualified analytical chemists. His office has made thousands of feather analyses. The record also discloses that he is widely acquainted with the manufacturing processes in the industry and that he has been in every plant processing feather and down in the eastern part of the United States, except one, including the plant of respondents herein and plants of respondents in related cases. He is familiar with the processes of separation of feathers in the raw state into various grades and testified he had seen it done in every plant but one in the eastern United States.

The expert called as a witness for respondents testified that he has been employed by the United States Testing Company, Inc., since September 1948, and that he worked for the company in the summers of 1942 and 1943. He graduated from Seton Hall College with a degree in chemistry in 1953. At the time of his testimony he had made or supervised about 100 analyses or tests of feather samples since his graduation in 1953. He also testified that he has been testing pillows for about five years. Both he and his brother are directly responsible to the manager of the textile department. His brother is supervisor of the dye laboratory and the witness works under him "as more or less an assistant supervisor." The United States Testing Laboratory started out primarily as a silk testing house and now has engineering, electronic and psychometric departments as well as textile, chemical, biological, and bacteriological laboratories employing about 500 people. Feather testing is but a relatively small part of the company's over-all activities.

The record discloses that the witness in support of the complaint customarily followed the sampling and testing procedure contemplated in the trade practice rules mentioned above and that that method generally is approved by all states with labeling laws. Unopened pillows (with seams intact) in condition similar to when placed for sale in retail stores were delivered by a member of the Commission's staff to a chemist-analyst in the witness' office.

The labels thereon were initialed and dated by the
870 recipient. The pillows were then turned over to two laboratory chemists "with instructions to be particularly careful because * * * [these were] cases which might come up for hearing at a later date." In each other's presence a single incision was made in each pillow submitted for sampling. This had been the practice in the witness' office for thirty years. The chemist who was to make the analysis then drew a sample from each pillow as follows:

> "A handful [of about three grams] was taken from the portion of the pillow nearest to the opening, placed in a cardboard box about three times the size of an ordinary shoe box; a second handful was taken from about the middle of the article, and a third handful was taken from the end of the article opposite to the opening. These three handfuls were then thoroughly agigated (sic) and a sample weighing approximately three grams was drawn [in pinches] from different portions of the box in which the three samples had been placed."

The sample thus obtained, the feathers, down, etc., was placed upon a wooden tray with three glass sides to prevent dissemination of the sample by air currents, the side towards the analyst being open. The sample was picked apart manually, tweezers with ivory tips being utilized to avoid the effect of static electricity and the various types of feathers and down were placed in glass beakers. The

pith, quill scales and any miscellaneous material similarly were separated. Each feather was picked out individually with nothing else adhering to it. The analysts by training and experience were qualified to determine the characteristics of those feathers. Where characteristics of a feather were inconclusive, microscopic examination was utilized to place it in the proper category. Material in each beaker was then examined by the witness and by two inspectors, all three of whom agreed that the beaker with down contained nothing but down, the goose feather beaker nothing but goose feathers, etc. Each separation took from four to five hours and the witness testified that while the separation is a slow procedure, it is not difficult. The contents of each beaker were then weighed on a chain-o-matic scale and weight percentages calculated. All five employees in the department usually looked at each sample after separation and, in most instances, all five initialed analyses reports indicating their approval of the separation and of the approximation of percentages stated therein.

871 Reports and physical exhibits on each pillow were then prepared and sent by the witness to the Commission and subsequently introduced in evidence. While the witness was "not present at all times when all of these procedures were followed through," the record clearly establishes that the testing and analyses were performed strictly according to his directions and under his direct supervision.

Respondents' witness testified that he analyzed contents of pillows from the standpoint of percentages as well as quality and that with regard to tests made by him they were performed on samples delivered to him by respondents in sealed containers. The samples consisted of feathers and down removed from each pillow from openings, or slits, made in the seam on each of three sides of each pillow. The samples were removed from pillows and placed in the sealed containers for delivery to the United States Testing Laboratories by respondents. The removal was accomplished by a representative of respondents be-

fore the hearing examiner and in the presence of counsel for both sides.

The method generally utilized by this witness in analyzing samples was described by him on the record as follows. The contents of each sealed container were emptied into a large cardboard carton and thoroughly mixed. Aliquot portions of the material were then drawn by him from the four corners and center of the carton to obtain as representative a sample as possible. The resulting samples weighed between 3 and 5 grams. He then gave the samples to the "young lady" employed in his office. He stated that she then:

> "• • • weighs these on an analytical balance to four place accuracy, calculates the percentage and returns the paper to me. I check her figures and calculations to be sure they are proper, examine the portions which she returns, and then write up the report. • • • we examined them visually and tried to establish the type of feather or down just by visual examination."

In the instant case the witness testified that portions of the materials being tested were examined microscopically to ascertain definitely the type of feathers or down which had not been done previously.

On the basis of professional qualifications and experience and by comparing testing techniques, the Commission has weighed the expert testimony and evidence and is constrained to adopt as determinative of the questions herein the results of the tests performed under the witness in support of the complaint.

872 Respondents herein label their pillows designated "Countess" as

"ALL NEW MATERIAL consisting of Down."

Two of these pillows were analyzed by the two expert witnesses appearing in support of and in opposition to the complaint. The results of the test conducted by the witness

in support of the complaint disclosed one "Countess" pillow as containing but 82.2% of down and the other but 80.3% of down, with the balance accounted for by feather (small downy type), fibers, pith and scale. This was clearly outside the 15% tolerance limit contemplated by the rules. Respondents' expert found these pillows to contain 86.2% down and 90.7% down, respectively. In arriving at these results he failed to differentiate between down fiber content and down. The record is clear that down and down fiber have different physical characteristics. Moreover, the trade practice conference rules, representing the judgment of the Commission and the industry jointly as to the unfairness of the practices described in them, expressly provide that down fiber shall be included in the 15% tolerance allowance. The witness in support of the complaint, in his analysis of respondents' pillows represented as "down," did not include down fiber in computing the percentage of down content. And in a related case he testified in response to a direct question from the hearing examiner as follows:

> "*Hearing Examiner Cox:* Under their [trade practice] rules, then, I cannot consider any of this downy fiber as being down?
>
> "*The Witness:* That is the way I interpret their rules.
>
> * * * * * * *
>
> That is my interpretation of their rules. They are the Commission's rules, and I think they can make their own interpretation of them."

The hearing examiner, however, in his initial decision included downy fiber as down, and in computing the average of the four tests conducted by both experts computed the average down content for the two "Countess" pillows to be 85.8%. He concluded that these pillows, therefore, met the required test. In so doing, he found that the test procedures adopted and followed by both experts complied

with the trade practice rules. The evidence is con-
873 flicting on whether down fiber should, as a practical matter, be included with down. We resolve that conflict by concluding that the trade practice rule providing that down fiber should not be included as down takes precedence; that the respondents' expert did not comply with those rules in making his analysis and that the hearing examiner was in error when he included downy fiber to arrive at the computed average of down content he did. We recognize that the record discloses the difficulties inherent in the mechanical processes of the industry in separating downy fiber and down, but we must give effect to the tolerance permitted under industry rules and emphasize that that tolerance, in our opinion, is adequate to allow for unavoidable error. In this connection we refer to the fact that on direct examination the witness in support of the complaint testified as to down pillows as follows:

> "Q. Is it your opinion, * * *, that in the filling of down pillows that the filling mixture or the filling content can be controlled to fall within a 15% tolerance:
> "A. I think the experiments I have conducted will show that they can be controlled within the 15% tolerance."

Also, the record shows that most of the twenty-eight states provide only for a 10% tolerance as compared to the more liberal 15% tolerance fraction set up in the trade practice rules here applicable. The record does not disclose that industry members have had any difficulty in meeting the state requirements.

Respondents also represent that their pillows designated "Chatham" are:

> "ALL NEW MATERIAL consisting of 50% Crushed Chicken Feathers
> 50% Crushed Duck Quill Feathers"

and pillows designated "Spring" and "Keystone" are:

"ALL NEW MATERIAL consisting of
50% Crushed Goose Quill Feathers
50% Crushed Turkey Feathers."

As to the "Spring" and "Keystone" pillows, the respondents' expert made no analysis and testified he had
874 written respondents to the effect that he did not feel accurate results could be given as to two of the samples and that ". . . we have attempted to analyze them and have issued reports on crushed feathers in the past, but we do not feel it is an accurate report because the crushed material is just what it is, it is crushed material and quite hard to separate." He stated his opinion to be that analysis of crushed feathers would be so inaccurate as to be without value.

The witness in support of the complaint's analysis of two "Chatham" pillows disclosed that they contained for the first pillow 63.7% crushed chicken feathers, 20.1% crushed duck feathers and for the second pillow 48.8% crushed chicken feathers and 38.7% crushed duck feathers. The hearing examiner mistakenly found that the respondents' expert analyzed a sample from the first Chatham pillow only and arrived at 45.3% crushed duck feathers and 48.0% crushed chicken feathers.

The analysis made by the witness in support of the complaint of a "Spring" pillow showed 40.4% crushed turkey feathers and no crushed goose feathers, fibers or quill present at all. His analysis of a "Keystone" pillow revealed 46.3% crushed turkey feathers and 15.8% crushed goose feathers. The respondents' witness made no analysis of the "Spring" and "Keystone" pillows. Actually the analysis to which the hearing examiner had reference was made by the Commission's witness and is an analysis of a third "Chatham" pillow. The respondents' witness, therefore, appears to have made no tests at all of crushed feather pillows. The uncontroverted analysis, therefore, disclosed that the two "Chatham" pillows represented as containing 50% crushed duck quill feathers actually con-

tained 20% and 38.7% of crushed duck quill feathers, substantially less than the amount of that type feather required with full tolerance. The "Spring" and "Keystone" pillows clearly are mislabeled insofar as their crushed goose quill feather content is concerned, the one "Spring" containing no trace of goose feathers whatever, and the other containing only 15.8% goose feathers.

The hearing examiner found that the crushing or curling process is a mechanical means of giving a twist or curl to a certain type of feathers to increase resiliency and to prevent matting, thus improving pillow quality. He further found that the method involves the placing of alternate quantities of different types of feathers from their separate containers into the cropper of the curling or crush-
875 ing machine; that, because of the nature of the types of feathers used in this process, they frequently appear in pillows being filled as lumps or slugs without ever being separated or mixed; that a crushed feather pillow is the cheapest industry product; that in the minds of the public there is very little distinction among the various kinds of crushed feathers, whether goose, duck, chicken, or turkey; and that, as to utility, crushed landfowl feathers are better than crushed waterfowl feathers, with crushed turkey being considered better than crushed chicken feathers. He concluded also that: "It is impossible to separate and analyze crushed feathers accurately."

As to pillows represented as containing crushed feathers the hearing examiner found no reliable, probative, and substantial evidence to show any public interest either in the matter of labeling or price-listing, or in distinguishing between the various kinds of crushed feather content; that, therefore, there had not been shown any violation of the act through misrepresentation insofar as respondents' "Chatham," "Spring" or "Keystone" pillows are concerned. The charges, in his opinion, not being supported by the evidence and there being no public interest, the hearing examiner dismissed the complaint herein.

The record shows without a doubt that there is a difference in public preference as between landfowl and waterfowl feathers and that the preference decidedly is for waterfowl—"goose feathers and goose down are very decidedly preferred by consumers." In similar vein the witness in support of the complaint, testifying as to whether one type of crushed feather is better than another, stated that:

> "It depends entirely on whether the customer decides he likes, desires a hard pillow or a soft pillow. Crushed turkey and chicken feathers produce a softer filling material than crushed goose and duck quills; and the medium pillow, between hard and soft, would be one that contained both chicken or turkey and goose and duck quills."

There has been no showing here that the public has any different feeling or preference as to utility when feathers are crushed. Having a preference for waterfowl feathers, they are entitled, when they see 50% crushed goose or other waterfowl on a pillow label, to get what they intend to purchase.

876 The corporate respondent's vice president, when asked how a retail purchaser selected its pillows testified as follows:

> "Most good shoppers, when they go in to buy a down or a down and feather pillow, usually pick up the pillow, and the first thing they do is to pick it up to see how much it weighs. Any good shopper, any good housewife, knows that the pillow is the right pillow if it is a light pillow and well filled and it isn't dirty and has no odor; it is a good pillow. She usually does that first.
>
> "Then she will usually look at the law label to find out what it contains. But she usually picks it up, weights it, puts it on the counter, presses her hands

on it, sees how fast it comes back, what resiliency there is, what buoyancy it has, feels of the feathers in it, and then she looks at the label."

The evidence discloses that crushed feather pillows are the cheapest in the trade. As a matter of fact, this witness testified that as to crushed feather pillows—

> "They are mostly sold to the poor families who cannot afford a high priced pillow, and then to a large extent to summer hotels, motels, lodging houses, and the like."

We conclude that the evidence herein is reliable, probative, and substantial as to consumer preference for waterfowl feathers; that that preference can be assumed to carry over to crushed feathers; that from the standpoint of utility there are distinct advantages and differences as between different types or kinds of crushed feathers and that while there may be no significant difference in price as between crushed waterfowl feathers and crushed landfowl feathers there is a significant difference in utility and the pillow buyer is entitled to get what the label represents the contents to be. Insofar as purchasers of pillows are concerned, we see no justification for recognizing any different standards or requirements to be observed with respect to purchasers at the lower end of the economic ladder than those observed with respect to purchasers at the upper end.

To the extent that the findings of fact contained in the hearing examiner's initial decision are not
877 inconsistent with the views expressed herein and in the Commission's opinion in the matter of Bernard H. Sumergrade and Harry Sumergrade, copartners, trading as N. Sumergrade & Sons, Docket No. 6135, such findings are affirmed. The conclusion and order dismissing the complaint as contained in the initial decision are reversed.

June 30, 1955

878 UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Edward F. Howrey, Chairman, Lowell B. Mason, James M. Mead, John W. Gwynne, Robert T. Secrest

In the Matter of

BERNARD H. SUMERGRADE and HARRY SUMERGRADE
copartners, trading as

N. SUMERGRADE & SONS

Docket No. 6135

On Appeal From Initial Decision

By Secrest, Commissioner:

Respondents have appealed from the initial decision which was filed by the hearing examiner at the conclusion of hearings at which evidence was presented in support of and in opposition to the allegations of the complaint.

The initial decision held that certain labels affixed by the respondents to their feather and down pillows and statements in invoices therefor which purported to show the types and proportions of their filling materials were false and had the capacity to mislead purchasers. The hearing officer additionally found that respondents' acts and practices in those connections have constituted unfair and deceptive acts and practices and unfair methods of competition in commerce and he held them to be unlawful under Section 5 of the Federal Trade Commission Act. The order contained in the initial decision would require respondents, in connection with the offering for sale and distribution of their feather and down pillows in commerce, to cease and desist from misrepresenting the identity of the type of filling material contained therein or the types and proportions of each when the filling material is a mixture of more than one kind or type.

879 Respondents urge that the samples of filling materials which were analyzed and were reported on in the course of the hearings do not accurately reflect the contents of the particular pillows from which they were taken and that, even if it were concluded that those samples were representative of the tested pillows, such pillows should not be regarded as necessarily representative of pillows generally produced and sold by the respondents under the trade names adopted by them.

Among the pillows manufactured by respondents are those distributed under the names of "King," "Ajax" and "Dayton," the down contents of which were respectively designated on their labels as 50%, 20% and 50%. Samples comprising several grams of filling material obtained from two pillows in each category were analyzed and testimony relating to analyses as independently conducted by two groups of technicians was received into the record. One group performing the separation and weighing procedures comprised personnel of the Division of Bedding and Upholstery, Maryland State Department of Health, their work being conducted under the supervision of the Chief of that Division who subsequently was called as a witness in this proceeding by counsel supporting the complaint. Called by the respondents was the chemist who had supervision of analyses performed by United States Testing Company, Inc., Hoboken, New Jersey.

The test data submitted by both witnesses showed that the samples of the fillings which were examined contained substantially less down than the amounts designated on the labels. Respondents' King pillows, for example, were labeled as 50% white goose down and 50% white goose feathers and as composed of new materials, but the sample analysis performed by the Division's technicians revealed, among other things, a down content of 20.2% for one pillow and 18.0% for the other. The test results of the United States Testing Company, Inc., on samples secured from the same pillows, were reported as 15.2% and 15.6%.

Only through analysis of its entire contents can the exact proportions of various filling materials contained in a pillow be determined with scientific exactness. In view of the inordinate amount of time required for separating such a large mass of minute constituents, projects in that respect have long been regarded as unfeasible. On the other hand, however, a procedure entailing careful withdrawals of three separate samples from different parts in a pillow and thoroughly mixing them, and subjecting a random sample of several grams of that mixture to separation and analysis, appears well designed to afford a representative sample of the filling contained in a down and feather product; and analytical studies so based are especially conclusive when corroborated by a separate analysis of a related product. The foregoing procedure was followed by the personnel who performed the Division's testing work. We think the sampling methods followed there were valid and hold that such analyses constitute probative evidence as to the percentages of filling materials contained in the sample pillows.

We turn now to consideration of respondents' contentions that the pillows which were sources of the test samples should not be regarded as representative of respondents' production of those particular brands of pillows. It is true that the percentage of each filling material component of a particular pillow is not likely to correspond precisely to the proportions of down and feathers contained in the mixture from which the product was filled. This occurs because down and feathers have no uniformity or homogeneity. After cleaning of the raw stock, the constituents of the down and feather mass are sorted by a blowing or suction process and while it is reasonably practicable to segregate a high percentage of down, marked discrepancies occur in the feather classifications. Later, when the materials are blended in the mixing bin, gravity forces tend to separate the lighter down from the feathers and to separate light feathers from heavier ones. Thus, in

the filling of large numbers of pillows, particularly under mechanical methods, the proportion of down and feathers afforded depends not only on the filling blend but also varies with other factors, one being the height in the bin from which the suction machine happens to be drawing filling. The filling material in the lower sections of a conventional sized bin suffices for a substantial number of pillows.

The foregoing considerations, however, are not primarily controlling to determination of the issues here, nor is it material that some of the pillows filled during the course of the various "runs" in which the test pillows were processed may have contained larger proportions of down than the sample pillows. Controlling, however, is the circumstance that the latter did not contain the amounts of down represented on their labels and that the shortages in those respects substantially exceeded the tolerances recognized under Rule 3, subparagraph III.(a) of the Trade Practice Rules for the Feather and Down Products Industry, which rules, while not having the force and effect of law, represent the considered judgment of the
881 Commission and the industry jointly as to the unfairness and the unlawfulness of the practices described in them. The tolerances recognized under the Rule are those not varying over 15% from the actual proportion of the weight of the entire mixture represented by each kind or type of filling.

Other exceptions are directed to the initial decision's conclusion as to the presence of second-hand feathers. The test data submitted by the witness called by counsel supporting the complaint indicated that second-hand goose feathers constituted 4.8% of the sample taken from one of respondents' King pillows, and 8% from the other. The reports submitted by the witness called by the respondents stated that the filling materials were apparently new materials. The feathers used in those pillows were obtained from European sources where it is apparently a common practice to mix previously used feathers with new feathers.

While the amounts of second-hand feathers revealed under the Maryland tests tend to negate possibilities of intentional adulteration, they nevertheless correspond to those sometimes found in importations from Europe. In the circumstances here, including due regard for the extensive experience of the personnel performing those studies and their apparently superior qualifications, in the aggregate, over the respondents' expert witness, we deem the analyses reported on by the witness called by counsel supporting the complaint to be the more persuasive and entitled to the greater weight. Hence, we concur in the hearing examiner's conclusions that respondents have failed to disclose the second-hand feather contents of certain of their pillows.

Respondents additionally state that inasmuch as the alleged deficiencies in labeling pertain to but six pillows which were all secured from the same retailer, those matters were erroneously held below to constitute unfair and deceptive acts and practices. Under the Federal Trade Commission Act, however, it is not necessary for the proof to show a long succession of acts which are deceptive or unfair. It is more than sufficient that the practices challenged in this proceeding relate to pillows sold under three different brand names and that each of the labels was false in one or more respects and manifestly had the capacity and tendency to deceive. Furthermore, the pillows came from regular commercial channels and the record contains testimony indicating that they were apparently intact when received for laboratory examination.

882 The appeal also urges that the variations between the contents of the filling and respondents' labeling are unavoidable and have occurred notwithstanding respondents' exercise of due care. It is true that the variations between the filling materials of finished pillows and those deemed by respondents to be represented in their filling mixes will result in instances, from matters over which the respondents have only partial control. These include un-

solved technical problems relating to sorting and uniformity of mixes and others concerning alleged unethical practices of foreign sources of supply, and compliance with state bedding laws. The tolerances recognized in the Trade Practice Rules take cognizance of certain of these problems. The considerations emphasized by respondents in this connection, however, do not justify deceptive labeling or false statements respecting the essential nature of their products. We reject respondents' arguments that compliance with the order is impossible and are of the view that the protection of the public interest requires that we affirm the order contained in the initial decision.

Likewise considered have been respondents' additional objections to the initial decision, including their exceptions to the hearing examiner's rejection of certain of respondents' proposed findings and conclusions. The rulings objected to appear free from prejudicial error and respondents' exceptions are not being granted. The appeal accordingly is denied and the initial decision affirmed.

June 30, 1955

47 UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 6275

In the Matter of

BARCLAY HOME PRODUCTS, INC.,
A CORPORATION, AND

ALEXANDER BUCHMAN AND LOUIS BUCHMAN
INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION.

* * *

Appeal Brief of Respondents

49 EXCEPTIONS TO HEARING EXAMINER'S INITIAL DECISION

Respondents except to the findings of the Hearing Examiner and his cease and desist order in the following specific respects:

First:

Exception is taken to the finding that the test results of respondents' experts cannot be accepted as accurate, and thus were not considered by the Hearing Examiner in determining the specific quantities of materials through an average of all the tests conducted.

Second:

Exception is taken to the finding of fact that the expert, who analyzed the samples of pillow filling material for the Commission and testified in support of the allegations of complainants, followed the procedures prescribed in the Trade Practice Rules for the Feather and Down Products Industry.

Third:

Exception is taken to the conclusion that violation of the Federal Trade Commission Act has been shown with re-

spect to representations made as to the contents of respondents' "Greylark" and "Lucerne" pillows.

Argument

The issue raised by this appeal is whether the evidence warrants the order of the Hearing Examiner against
50 respondents to cease and desist from misrepresenting the contents of pillows manufactured by them.

It is respectfully urged that said evidence does not support such order.

As a basis for the exceptions specifically set forth, respondents offer the following:

First Exception

The Hearing Examiner was in error in not averaging the tests of respondets' experts with those of the complainant's expert in arriving at a fair determination of the quantities of materials contained in the pillows.

With respect to this issue, the case against respondents is identical to the cases brought by complainant against other manufacturers in the Feather and Down Products Industry. See for example the related cases known as F.T.C. Docket Numbers 6132, 6133, 6134, 6135 and 6137.

While we believe that each case must be determined on its own merits, there are certain phases of each case, in addition to the issue of averaging, which were identical. Thus, by stipulation, it was agreed that there may be considered as part of the record in this case those portions of the records in F.T.C. Docket Numbers 6132, 6133, 6134, 6135 and 6137 "which relate to the feather and down industry generally, the practices in that industry, methods of sampling and analysis of feather and down products, the qualifications of and methods of analysis used by J. Davis Donovan and his associates."

It should also be noted that the Hearing Examiner in this case, J. Earl Cox, was the Hearing Examiner in all the related cases referred to above. This same Judge Cox in

the cases, Docket Numbers 6133, 6134, 6135 and 6137, averaged the tests of both complainant and respondents' experts in arriving at a fair determination of the contents of the pillows in question.

Furthermore, in the cases, Docket Numbers 6234, 6135 and 6137, Mr. Ernest Anderson of United States Testing Company, Inc., one of respondents' expert witnesses
51 herein, appeared as an expert witness for respondents in those cases. Judge Cox attested in those cases to the evidentiary value of Anderson's expert testimony by considering the latter's tests of equal value with complainant's tests in assaying the contents of the pillows. At no time during the hearings in the instant case did Judge Cox or counsel for complainant object to the introduction of the expert testimony of Anderson. Nor was there any objection during the course of any hearing to the testing methods of Anderson, either as to the instant case or any other case in which he had appeared. Anderson's qualifications, testing methods, background and experience were well known to the Hearing Examiner and counsel for complainant from his appearance in the previous related cases mentioned above.

It is axiomatic in the law that all persons in the same class or category must be afforded fair and *equal* treatment. The respondents herein are in the same class, i.e. manufacturers in the Feather and Down Industry, as respodents in cases Docket Numbers 6133, 6234, 6135 and 6137. In those cases, respondents' expert testimony was given the same weight as complainant's, and in cases Docket Numbers 6134, 6135 and 6137, as in the instant case, respondents' expert witness was Ernest Anderson.

Although we believe Anderson's qualifications as an expert clearly have been established, his ultimate competence is not relevant to this argument. The fact remains that the Hearing Examiner had never previously questioned Anderson's capabilities and under similar circumstances had given his testimony justifiable weight. This case, as

regards respondents' expert's method of analysis, cannot be distinguished from the other cases in which testimony of that expert was rightfully accepted.

Consequently, it is urged that it is reversible error to reject Anderson's test results and not average his results with those of complainant's experts, inasmuch as this method of determining the contents of the pillows
52 had been utilized as regards the other manufacturers in the same class as the instant respondents.

Had this procedure been followed herein, the results would have clearly shown no unfair practices or misrepresentations on the part of respondents as herein charged. Averaging the tests of experts for both sides shows the contents of the pillows in question to be as follows:

"Greylark" pillows .... 86.825% Down
"Lucerne" pillows ..... 41.425% Down

These results show the "Greylark" pillows are clearly within the 15% tolerance allowed under the Trade Practice Rules.

As to the "Lucerne' 'pillows, the average of the tests show that this pillow is only about 1% less than the tolerance provided under the Trade Practice Rules and constitutes such an inconsequential deviation that there is no substantial public interest whatsoever.

In addition, for other reasons discussed under the Second Exception, below, complainant has failed in its proof regarding the "Lucerne" pillows.

Complainant's own expert, on cross examination, testified that he always averages, and *the larger the number of pillows* averaged, the more representative is the result.

* * * * *

MR. DONOVAN: Mr. Kieffer where we run three or more pillows, two or more pillows from the same manufacturer, out of approximately the same type of filling material may be brand names. We always average them up. The further we go, the larger the number of

pillows, the closer you will find that average comes to each individual pillow.

* * * * *

MR. DONOVAN: If we had six pillows I don't think I would send back to get another test. I would average the six of them up. If one had 10 per cent more down than the other five, that would just bring that manufacturer's average in that batch up a little bit, probably bring him within the tolerance. If he did not have that 10 per cent it probably would leave him under.

53 MR. KIEFFER: But you are indicating that if one of the batch had 10 per cent more than the others you would not necessarily re-test that pillow, you would put it with the general batch?

MR. DONOVAN: Put it in the batch and my idea is to get a picture of whether he is living within the law or whether he is skirting on the edge or whether he is out on the edge where the ice is pretty thin.

* * * * *

(Donovan/Cross-46-48)

Second Exception

Even if complainant refuses to follow its own expert's opinion that averaging the greatest number of pillows most accurately represents the contents, complainant nevertheless has failed to prove its case.

Complainant's expert not only did not follow—but did not know the Trade Practice Rules.

Judge Cox found that the Commission's expert, J. Davis Donovan, who analyzed the samples and testified in support of the complaint, followed the procedures prescribed in the Trade Practice Rules.

This finding is demonstrably without foundation.

Under Trade Practice Rule 3, II, Subdivision (j), damaged feathers are defined to be "Feathers other than crushed, chopped or stripped, which are broken, damaged by insects *or otherwise materially injured.*" (Emphasis added.)

Donovan's analysis with respect to respondents' pillows

designated "Lucerne" showed in the case of Pillow 3—damaged feathers 6.8 per cent, and in the case of Pillow 4—damaged feathers 3.9 per cent.

Donovan, who did not conduct the analysis himself, testified at page 24 as follows:

> "* * * the analysts in these cases were instructed to classify all damaged feathers *as damage* and not to use their own judgment as to whether they were *materially damaged* or whether they were not." (Emphasis added.)

54 The cross-examination of Mr. Donovan regarding this point at pages 23 and 24 read as follows:

> "MR. KIEFFER: With respect to Commission's Exhibits 3 and 4, being those pillows of Barclay containing 50 per cent goose down and 50 per cent goose feathers, in your opinion is the amount of 6.8 per cent of damaged feathers of any consequence so far as the purchasing public is concerned?
>
> "MR. DONOVAN: That would depend entirely upon how badly they were damaged. The Commission's rules, Fair Trade Practice Rules, under which these analyses were made, defines damaged feathers as a feather showing any damage, and *we made no effort to distinguish between feathers that were slightly damaged and feathers that were badly damaged.* (Emphasis supplied.)
>
> "MR. KIEFFER: Well, Mr. Donovan, I note in the Trade Practice Rules that the definition of damaged feathers on page 4 under Rule 3, entitled 'Definitions' states that 'damaged feathers are feathers other than crushed, chopped or stripped, which are broken, damaged by insects, *or otherwise materially injured.*' (Emphasis supplied.
>
> "You just mentioned that the damage could be any damage. This says 'materially injured'.
>
> MR. DONOVAN: The question of material damage is one which differs from person to person, so that the analysts in these cases were instructed to classify all damaged feathers as damage and not to use their own judgment as to whether they were materially damaged or whether they were not.

"MR. KIEFFER: Well, Mr. Donovan, then you cannot say whether or not the damaged feathers here are feathers which are damaged in accordance with the Trade Practice Rules?

"HEARING EXAMINER COX: He has just answered."

* * * * *

Vital also in considering the reliability of complainant's expert Donovan is Donovan's failure to break down, as required by the Trade Practice Rules, his analyses concerning "fiber" with respect to all respondents' pillows.

In the case of respondents' "Greylark" pillows,
55 Donovan's analyses show "feather fiber" for Pillow 1 in the amount of 1.4 per cent, and for Pillow 2 in the amount of 2.6 per cent.

However, in the case of respondents' "Lucerne" pillows, Donovan finds merely "fiber" for Pillow 3 in the amount of 3.2 per cent, and for Pillow 4 in the amount of 1.8 per cent —thus leaving to the determination of the Commission alone a basic finding of fact as to whether, under the Trade Practice Rules, such "fiber" is *feather* fiber or *down* fiber.

Donovan's failure to distinguish between the two is contrary to the mandate prescribed in Trade Practice Rules, Rule 3, II under the captain "Definitions" where *down* fiber is clearly defined under subsection (b) and *feather* fiber is clearly defined under subsection (h).

Third Exception

How can the Commission support Judge Cox's finding that the complainant's expert, in his analyses, followed the procedures prescribed in the Trade Practice Rules and thus base his entire conclusions on such finding, when complainant's own expert not only did not follow, ***but did not know,*** the Trade Practice Rules.

Accordingly, complainants have not proved their case.

* * * * *

145 **EXCERPTS FROM TRANSCRIPT OF TESTIMONY**

Charles D. Pomerantz

Mr. Kieffer: Mr. Pomerantz, we will continue.

By Mr. Kieffer:

Q. Mr. Pomerantz, will you describe briefly the procedures which you have followed in arriving at these reports, or analyses, following the date when you actually received the samples for testing? A. On receiving the samples I can do as I usually do—I make no change at all. What I do is, I empty out in this case—in this case I emptied out the components of the container and started. I stirred it up thoroughly and watered the sample down to 3 grams, after which I proceeded to manually separate the down and the feathers and weighed each component individually. And determined the percentages from the weights.

I did the same thing with the one—with the down, the other was the 50-50 bale.

Q. Your report that is marked 2-A, is the report of all down sample? A. Yes.

Q. And the report marked 4-D? A. And the feathers on the Respondents' Exhibit 2 was 9.8%. The feathers on the Respondents' Exhibit 4 was 56.0%.

Will you please correct that to Exhibit 4-A.

Mr. Kieffer: I have no more questions of Mr. Pomerantz.

Hearing Examiner Cox: You may inquire, Mr. Williams.

146 Cross-Examination

By Mr. Williams:

Q. In Analysis 2-A, Mr. Pomerantz, what kind of down is that? A. You mean as to type?

Q. Yes. A. I didn't analyze for the type of down, as goose or duck.

Q. Which was it, goose or duck, do you know? A. I don't know. I didn't test for that. All I was asked for

was the termination—rather, the determination— the amount of feathers and amount of down in the sample.

Q. Isn't that part of the test—I mean, when you make a separation of down, don't you know whether it is goose or duck? A. No, it is not easy. As a matter of fact, I developed a test for determining the difference between goose and duck down, and it is tedious. The procedure is tedious whereby the individual downs are placed under a microscope and checked that way.

Unless there is a special request for that type of analysis—

Q. You didn't make that type of analysis? A. No, not that type of analysis—no.

Q. How much down fiber did you find in 2-A? A. I found 3.2%. The reason I did not indicate that separately is that I indicate that only when there is excessive amount of fiber; then I indicate that separately. Otherwise, I lump it together.

147 Q. Here you included it along with the down? A. Yes.

Q. You have feathers here, 9.8%. What kind of feathers were they? I didn't check the feathers—I mean, they were either duck or goose. I didn't check that.

Q. How about the characteristics, were they contour feathers or quill feathers? A. No, no, they were little neck feathers. These little ones about, actually—about an inch in length. In other words, they were the kind of feathers that were the loam off the down, if you were trying to separate for pure down.

Q. How about pith and scale, didn't you find any? A. Not to any extent.

Q. Well, to what extent did you find any? A. Just a couple of pieces of scale on the table of analyses as done. It is probably less than a 3/10ths of a per cent; which is a negligible quantity.

Q. And your final weight of the sample, that you analyzed was exactly 3 grams? A. Well, it is in the neighborhood of 3½ grams.

Q. However, was that the gross sample—when you started, how much did that weigh? A. I didn't weigh that, but I could—let me see.

• • • • •

149 Q. Do you have a separation here that you made on both of these? A. No, I didn't break the separations. I didn't bring the sample, although I have them.

Mr. Kieffer: We are prepared to submit those if the Judge would like them.

• • • • •

151 Mr. Kieffer: I want to offer these exhibits marked 2 and 4-A as Respondents' Exhibits in evidence.

Mr. Williams: I have no objection.

Hearing Examiner Cox: They may be admitted.

(The papers referred to, heretofore marked for identification Respondents' Exhibits 2-A and 4-A, were received in evidence.

Mr. Kieffer: Mr. Anderson, will you please take the stand.

Hearing Examiner Cox: Will you step forward, please, Mr. Anderson.

Ernest W. Anderson

was thereupon called as a witness for the respondents and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kieffer:

Q. Would you state your name and your address, please? A. Ernest W. Anderson, representing the United States Testing Company, 1415 Park Avenue, Hoboken, New Jersey.

Q. Mr. Anderson, you have been used as an expert in several or more of these companion cases before the Fed-

eral Trade Commission, and I might ask you a general question as to methods of procedures and analyses:

• • • • •

156 Hearing Examiner Cox: They may be marked. Do you want those containers with the separations in, that these people made?

Mr. Williams: The ones they made—well, I think if they have them we can. We ought to submit them. We did ours, you know.

Mr. Kieffer: Are yours submitted in evidence?

Hearing Examiner Cox: They are in evidence.

Mr. Kieffer: We will be pleased to submit them.

Hearing Examiner Cox: You can get them.

Mr. Kieffer: Mr. Pomerantz indicated that his were likewise available.

Hearing Examiner Cox: Will you get them and bring them in and we will mark them down there when they
157 are brought in. I understand there will be no objection to admission in evidence.

Mr. Williams: No.

Hearing Examiner Cox: The record may show that those separations, when presented, will be admitted in evidence without objection.

You will please mark the exhibits in evidence, Mr. Reporter.

(The papers referred to, heretofore marked for identification Respondents' Exhibits 1-A and 3-A, were received in evidence.)

Hearing Examiner Cox: Mr. Anderson, you are excused.

(Witness excused.)

Mr. Kieffer: Your Honor, I would like to make a motion that the complaint be dismissed on the grounds that, following the averaging procedures which I have noted were contained in various decisions, during recent months, the results here in the case of the pillows referred to in the complaint as gray lark, all new material, consisting of

down, are in such case, or result in an average in such case of 86.82½ per cent when the average of the test conducted by Mr. Donovan, Mr. Pomerantz and by the United States Testing Company are concerned. And in the case of the pillows referred to in the complaint, and designated Lucerne, which are 50 per cent white goose down and 50 per cent goose feathers; similar averaging of the test conducted by these three different experts, results in the down being 41.27 per cent, which is approximately 1 per
158 per cent—actually, 1.073 per cent, less than the tolerance provided under the trade practice rules in the case of 50-50 feathers.

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202 **Respondent's Exhibit No. 4A**

FEDERAL TRADE COMMISSION

Docket No. 6275

In the matter of Barclay Home Products.
Date: May 5, 1955.
Witness: Pomerantz.

Reporter: Kernes, Electreporter, Inc., Official Reporter.

Charles D. Pomerantz
Consulting and Research Chemist
75 Hawthorne Street
Brooklyn 25 New, N. Y.
BUckminister 7-1398
Laboratory Report

Analysis No. 7320.
Date Received: April 30, 1955.
Sample of feathers and down in a sealed container and bearing the following label—Resp. Ex. for Identification D. 6275.
Test for Composition.

Analysis:

Down and Fibre	44.0%
Feathers	56.0
	100.0%

Submitted,
Charles D. Pomerantz, B.S., M.A.

Dated: May 2, 1955.

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207 **Oral Argument on Behalf of the Respondent**

By Mr. Becker.

* * * * *

209 Moreover, the record shows that in all the prior cases, the Examiner felt that all the experts treated —the techniques may have been different in a small degree— the analysis in accordance with the Trade Practice Rules. Now, in the decision of Barclay Products, he ignores that fact—and I say the Examiner, in due respect to him—just disregards the experts in this case on the ground that their analyses were inaccurate.

Now, I don't think that that is a fair presumption on his part, to just disregard these experts on that ground. No question was even raised in the briefs concerning their credibility or their experience or qualifications. As a matter of fact, one of our experts is one of the outstanding in the country, and employs over five hundred people. That is United States Testing Company. The other, Mr. Pomerantz, was employed by the Bedding Division of the New York State Department of Labor.

So I feel it is reversible to restrict the test results of these experts. It would be far better to send the
210 matter back for a new trial so that full justice be rendered in this case under these circumstances.

With respect to Mr. Donovan, the Government expert, which is regarded as the only good expert in the case, he did not comply with the Trade Practice Rules in arriving at an analysis. He didn't break down the component parts

as set forth in the Trade Practice Rules. For instance, as you can see in the briefs and the exhibit shows, he didn't break down, for instance, the down fibers and the down feathers. Not that it made any difference, because we feel that the results, the Trade Practice Rules, do not exclude any other method in arriving at a decision by a competent expert.

For instance, the Rules referred to on page 5 to specifically refer to an illustration say, "A proper method of testing." It doesn't say, "The only method of testing," or that this will be the method of testing. It says, "A proper method of testing."

If you arrive at certain conclusions that there is so much down—and we feel that we have met that test because both of our experts found that we had the right quantities of down—now, there hasn't been a substantial deviation in these cases. There have been very slight deviations from the quantities of down required by the Trade Practice Rules.

So I feel that the Government's witness, Donovan, with respect to the Respondent's pillows, did not follow
211 the rules to nth degree. If it is contended now that our experts did not follow the rules.

I will concede now that our experts separated the down from the feathers until the down reached the proper proportion. If that is their method and the experts say that it is a proper way of reaching the conclusion, that is one thing. But if the experts did this, it can't be said that it is inaccurate if the Government's witness didn't break it down into every component part. As a matter of fact, he went so far as to state he made no effort to distinguish between feathers that were slightly damaged and feathers that were badly damaged.

Now under the Rules, it seems to point out, at least, or infer that there is a difference of damaged feathers. I refer to the definition under "Damaged Feathers." It says, "Feathers other than crushed, chopped or stripped."

Expert Donovan didn't point out to any extent that these damaged feathers were materially damaged. I don't think the question comes up as to extensive damage or to slight damage.

So in this particular case, to render justice, I submit to this Honorable Commission that the techniques used by these experts—neither the Government nor ours—if that be so, complied with the Trade Practice Rules. If that is so, they should be sent back to the Examiner so that it can be submitted on what would be the full compliance with the Trade Practice Rules.

212 Now, I think the second material point is that the evidence submitted by our experts is material, substantial and relevant and is credible because it is based on sound methods of analysts whose qualifications have been unchallenged by either the Hearing Examiner or the Commission's Counsel, and it was his error to ignore this testimony.

The inaccuracy attributed to our analysis are immaterial as regards the separations which we allegedly did not make, in as much as these separations are required by "a proper method", but there is no limitation as to another proper method of testing.

When three analysts, all reliable and experienced, conduct a test and the results of one of them are materially different from the other two, the only logical conclusion which can be reached is that the one differing greatly must have erred in his calculations. It is my opinion that Donovan's error, the Government's witness, could reasonably be attributed only to a mistake on the part of his analysis.

I submit, in this case, that the injustice, from my point of view, that merits consideration is that when this Barclay Home Products case was tried, it was tried after four cases had been completed and decided by an Examiner before the Commission rendered its decision. And maybe if I were the Examiner, and I saw the decision come down in which they decided against me, and they have a

213 right to do so, that I would throw up my hands and say, "Well, I will just find violations in this particular case, and just throw out the entire testimony of Barclay Products. That may be the easiest and simplest thing to be done."

I think it requires a little more serious consideration than just that. I don't think you can ignore two experts as little as all that.

Thank you very much for your consideration.

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15 Received August 2, 1955.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 6275

In the Matter of

BARCLAY HOME PRODUCTS, INC.,
A CORPORATION, AND

ALEXANDER BUCHMAN AND LOUIS BUCHMAN
INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION.

Order Admitting Exhibits Into the Record and Closing Proceedings Before Hearing Examiner

Respondents' Exhibits, for identification, 1 through 4 are cartons containing samples taken by respondent from the pillows introduced into evidence in this proceeding by counsel supporting the complaint, and identified as Commission's Exhibits 1 through 4, respectively. These are the samples upon which the tests were made by the respondents' experts, the reports of which were received in evidence herein as Respondents' Exhibits 1-A through 4-A, and have been submitted by counsel for respondents as exhibits for admission into evidence. There being no ob-

jection thereto on the part of counsel in support of the complaint, counsel for the respondents having rested his case by letter dated July 27, 1955, counsel supporting the complaint having rested his case on the record herein, and both counsel having waived the filing of proposed findings, proposed conclusions, and proposed order herein,

IT IS ORDERED that Respondents' Exhibits I through 4, respectively, consisting of cartons containing samples of pillow contents taken from pillows designated as Commission's Exhibits 1 through 4, respectively, be, and the same hereby are, admitted into evidence in this proceeding as Respondents' Exhibits 1 through 4, respectively.

IT IS FURTHER ORDERED that all proceedings herein before the Hearing Examiner be, and the same hereby are, closed as of this date.

J EARL COX,
Hearing Examiner.

August 2, 1955.

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CITATIONS

Cases:

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Burton-Dixie Corp. v. *Federal Trade Commission*, 240 F. 2d 166 — 3, 5

C. E. Niehoff & Co. v. *Federal Trade Comm.*, 241 F. 2d 37 — 6

Democrat Printing Co. v. *Federal Communications Commission*, 202 F. 2d 298 — 5

Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U. S. 492 — 4

Federal Trade Commission v. *C. E. Niehoff & Co.*, No. 935, this Term, certiorari granted June 3, 1957 — 6

The L. Buchman Co. v. *Federal Trade Commission*, 235 F. 2d 344 — 3

Lazar v. *Federal Trade Commission*, 240 F. 2d 176 — 3

Moog Industries, Inc. v. *Federal Trade Commission*, 238 F. 2d 43, certiorari granted, 353 U. S. 908 — 6

Northern Feather Works v. *Federal Trade Commission*, 234 F. 2d 335 — 3

The Salisbury Co. v. *Federal Trade Commission*, C. A. 8, No. 15429, February 28, 1956 — 3

Sanitary Feather & Down Co. v. *Federal Trade Commission*, 235 F. 2d 344 — 3

Sumergrade v. *Federal Trade Commission*, 234 F. 2d 335 — 3

United States v. *Tucker Truck Lines*, 344 U. S. 33 — 4

Statutes:

Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45:

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1006

BARCLAY HOME PRODUCTS, INC., AND ALEXANDER BUCHMAN AND LOUIS BUCHMAN, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1–2) is reported at 241 F. 2d 451.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1957. The petition for a writ of certiorari was filed on May 15, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners had not urged before the Federal Trade

Commission the grounds upon which they challenged the Commission's order in court, and that the court therefore need not consider petitioners' contentions.

2. Whether this Court should review an alleged conflict between circuits with respect to the correctness of the Commission's evaluation of similar expert testimony given in two different, albeit related, administrative proceedings.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in part, as follows:

> (a)
>
> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After full administrative proceedings, the Federal Trade Commission found that petitioners, in violation of Section 5 of the Federal Trade Commission Act and contrary to the standards contained in industry Trade Practice Rules, had misrepresented the contents of pillows which they manufactured and sold, and entered a cease-and-desist order (J. A. 16–28). The order was one of eleven which the Commission, in a series

of related proceedings, issued against substantially all members of the feather and down products industry. Six of the other orders have been judicially upheld;[1] in *Burton-Dixie Corp.* v. *Federal Trade Commission*, 240 F. 2d 166, however, the Court of Appeals for the Seventh Circuit set aside the order for lack of substantial evidentiary support.[2]

In the instant case, one expert witness testified for the Commission and two expert witnesses testified for petitioners with respect to the contents of their pillows.[3] Portions of the records in some of the other cases, relating to industry practices generally and the qualifications and testing methods of the Commission's expert, were incorporated by reference (J. A. 16–17).

The Commission, affirming the initial decision of the hearing examiner (J. A. 16–25), upheld his conclusion (J. A. 24) that the tests made by petitioners' experts were inaccurate, whereas the tests made by the Commission's expert were accurate and showed

[1] *Northern Feather Works* v. *Federal Trade Commission*, and *Sumergrade* v. *Federal Trade Commission*, 234 F. 2d 335 (C. A. 3); *Buchwalter* v. *Federal Trade Commission*, *The L. Buchman Co.* v. *Federal Trade Commission*, and *Sanitary Feather & Down Co.* v. *Federal Trade Commission*, 235 F. 2d 344 (C. A. 2); *Lazar* v. *Federal Trade Commission*, 240 F. 2d 176 (C. A. 7).

[2] No judicial review was sought in two of the remaining three cases (Docket Nos. 6136 and 6189); in the third case, a petition to review was dismissed for non-prosecution (*The Salisbury Co.* v. *Federal Trade Commission*, C. A. 8, No. 15429, February 28, 1956).

[3] The Commission's expert (Donovan) testified in all of the proceedings. One of petitioners' experts (Anderson) testified in a number of them.

that the contents of petitioners' pillows had been misrepresented (J. A. 27–28).

The Court of Appeals for the District of Columbia Circuit, in a *per curiam* opinion, unanimously affirmed the Commission's order. The court held that the grounds on which petitioner challenged the order—contentions stemming from the Commission's acceptance of the tests conducted by its expert and its rejection of those conducted by petitioners' experts—"were not urged before the Commission," and that the court was "therefore, not bound to consider them now" (Pet. App. 2). The court further "note[d] our agreement" with the Courts of Appeals for the Second and Third Circuits "in sustaining the Commission's like evaluation of these tests in related cases involving other members of this industry" (*ibid.*; see note 1, *supra*.[4]

ARGUMENT

The holding of the court of appeals—which we believe to be correct—was that since petitioners had not urged before the Commission the grounds upon which they were challenging its order, the court would not consider such grounds. Although petitioners contend (Pet. 11–15) that they did raise these points before the Commission,[5] that is a factual question which the court

[4] In all of the cases, the Commission had accepted the tests made by its expert, and had rejected the tests made by the companies' experts.

[5] Petitioners do not challenge the ruling below that issues not raised before the Commission may not be urged before the reviewing court. Cf. *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 36–37; *Federal Power Commission* v. *Colorado Inter-*

below resolved against them.[6] The correctness of that resolution plainly presents no question warranting further review by this Court.

The statement by the court of appeals that it was in agreement with the decisions of the Courts of Appeals for the Second and Third Circuits upholding, in related cases, the Commission's evaluation of similar expert testimony, is dictum or, at most, an alternative holding. There is thus no basis for the claim that there is a conflict (with the *Burton-Dixie* case, *supra*, p. 3) requiring resolution by this Court.

We point out, moreover, that no conflict is alleged with respect to any legal question, but only with respect to the factual question whether the Commission properly evaluated conflicting expert testimony. Even apart from the consideration that the evaluation of the record by the court below was at most an alternative holding, it would not seem that one court's decision appraising the evidence underlying a Commission order creates a true conflict with another court's decision rejecting the Commission's evaluation of testimony of two of the same three witnesses, given

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state Gas Co., 348 U. S. 492, 500; *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F. 2d 298, 303–304 (C. A. D. C.).

[6] The only issues which petitioners urged in their appeal to the Commission from the examiner's initial decision were that he had erred (1) in not averaging the results of the tests made by all the experts, and (2) in accepting the tests of the Commission's expert, which allegedly had not been made in compliance with prescribed testing procedures. The contentions which they made before the court (see Pet. App. 2, note 3), however, were substantially different.

in a different, albeit related, proceeding, which was decided on a different record.

Petitioners' suggestion (Pet. 11) that the instant case is similar to *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43 (C. A. 8), certiorari granted, 353 U. S. 908, because they are at a competitive disadvantage *vis-à-vis* the Burton-Dixie Corporation, is untenable. In *Moog,* the court of appeals affirmed a Commission cease-and-desist order, but refused to stay its effectiveness until the Commission had issued similar orders against other firms in the industry. See also *Federal Trade Commission* v. *C. E. Niehoff & Co.* (No. 935, this Term, certiorari granted June 3, 1957), where the Court of Appeals for the Seventh Circuit reached a contrary conclusion (241 F. 2d 37). In the instant case, however, orders have been issued against substantially all members of the industry and, with one exception, they have either been judicially upheld or not challenged. The *Moog* and *Niehoff* cases also raise questions with respect to the power of the court of appeals to postpone the effective date of a Commission order. The instant case, however, raises only the question whether an order, otherwise valid, should be set aside because another order, issued in a related proceeding against similar illegal practices by a competitor, has been reversed for lack of substantial evidence. The answer to that question clearly is negative.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no substantial question is presented.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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